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No. 831

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENGINEERS ASSOCIATION,

Petitioner-Appellee,

—against—

SPERRY GYROSCOPE COMPANY,
Division of Sperry Rand Corporation,

Respondent-Appellant.

JOINT APPENDIX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ENGINEERS ASSOCIATION,

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—against—

SPERRY GYROSCOPE COMPANY,
Division of Sperry Rand Corporation,

Respondent-Appellant.

Statement Under Rule 15(b)

This proceeding was commenced by petition and notice of motion filed on September 27, 1956. The answer to petition was served on October 11, 1956. The reply and rebuttal affidavits and a brief by each party were handed to the District Court Judge and oral argument had before him on October 18, 1956. The opinion and judgment of the District Court were entered on February 5, 1957 and the notice of appeal was filed on February 28, 1957.

Notice of Motion to Compel Arbitration

(1) PLEASE TAKE NOTICE that, pursuant to Sections 4 and 6 of the United States Arbitration Act, U. S. C. Title 9, and upon the annexed petition, verified the 27th day of September, 1956, the undersigned will make an application to this Court at a Stated Term for Motions to be held at the United States Court House, Foley Square, City of New York, on the 11th day of October, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order directing respondent to proceed with the arbitration demanded by petitioner on August 21, 1956 and more fully described in the annexed petition, in accordance with the written provisions of the agreement to arbitrate contained in the annexed agreement, and for such other and further relief as to the Court may seem just and proper.

Petition for Order Directing Arbitration

(2) Petitioner, for its petition herein, alleges:

1. Jurisdiction of this Court is based on Section 301 of the Labor Management Relations Act, 1947, U. S. C. Title 29, Section 185 and the United States Arbitration Act, U. S. C. Title 9. The matter in controversy exceeds the sum or value of $3,000. exclusive of interest and costs and arises under the laws of the United States.

2. Petitioner is and at all times hereinafter mentioned was a labor organization and the sole collective bargaining representative of all employees employed by respondent in specific occupations and locations listed in the current bargaining agreement of the parties, a true and exact copy of which is annexed hereto as Exhibit "A" and made a part hereof. The employees of respondent who are represented by petitioner are engaged in the manufacture of goods for interstate commerce.

3. Respondent is a Corporation duly organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of New York. Respondent's executive offices are located at 30 Rockefeller Plaza in the City, County and State of New York. Respondent is engaged in the manufacture of goods for interstate commerce.

(3) 4. Effective as of March 15, 1956, petitioner and respondent entered into a collective bargaining agreement, annexed hereto as Exhibit "A", which continues in force and effect to March 14, 1958. Said agreement evidences a transaction involving commerce.

5. In Article 20 of said agreement, petitioner and respondent agreed to the procedures to be followed to settle disputes, differences and grievances arising between them.

6. In Paragraph F of Article 20 of said agreement, petitioner and respondent agreed to arbitrate all unsettled disputes, differences and grievances arising out of the interpretation or application of the provisions of the agreement. Paragraph F of Article 20 provides as follows:

> "F Arbitration
>
> 1. Unless otherwise provided elsewhere in this Agreement, all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement that shall not have been satisfactorily settled within two weeks following the procedure hereinabove set forth shall, at the request of either party, be promptly submitted to arbitration. In the event that the parties fail to agree on an arbitrator, then at the request of either party an arbitrator shall be designated by the American Arbitration Association. The decision of the arbitrator shall be final and binding upon all parties and shall be complied with promptly.
>
> 2. The Employer and the Association shall bear equally the arbitrator's fees and other expenses incidental to arbitration."

7. On or about May 31, 1956, a dispute arose between petitioner and respondent as to the interpretation and application of Paragraphs H and J of Article 18 of the current collective bargaining agreement. Said dispute arose out of the following facts:

(4) (a) During May of 1956, respondent requested a number of employees represented by petitioner to consent to their being transferred to a customer assignment in Pasadena, California. Respondent promised such employees salary increases of between 6 percent and 12 percent of their monthly salaries in order to induce such

employees to consent to the aforesaid transfer. Those who did consent were granted the promised salary increases. Those who did not consent were not given any salary increases.

(b) The salaries of all employees represented by petitioner, after having been negotiated by and between petitioner and respondent, have been written into and made a part of Article 18 of the agreement.

(c) By Paragraph H of Article 18, respondent may not increase such salaries except on the basis of merit only. The pertinent portion of Paragraph H of Article 18 provides:

> "Salary increases for individual employees in excess of the minimum salaries set forth above shall be on a merit basis only."

(d) Petitioner, on or about May 31, 1956, notified respondent that the salary increases promised and given by respondent to the aforesaid employees, upon condition that such employees consent to their being transferred to a customer installation in Pasadena, California, were based upon considerations other than merit, namely, a consent to be transferred. Since Paragraph H of Article 18 permits salary increases "on a merit basis only", petitioner's position was that respondent violated such provisions of the agreement by giving salary increases on the basis of considerations other than merit.

(e) Respondent interpreted Paragraph H of Article 18 contrary to petitioner's interpretation and, further, (5) claimed that the salary increases in question truly constituted merit increases; therefore, they were properly promised and given under Paragraph H of Article 18.

(f) The parties, therefore, are in dispute as to whether the aforesaid salary increases are or are not merit in-

creases and, therefore, whether they were or were not given in violation of Paragraph H of Article 18.

(g) The foregoing dispute between the parties arises out of the interpretation and application of Paragraph H of Article 18 of the current agreement between the parties. Such dispute is arbitrable under Paragraph F of Article 20 of said agreement.

(h) Petitioner further asserted that respondent's action violated Paragraph J of Article 18, which provides that:

> "The letter agreement dealing with merit review dated April 15, 1954, is incorporated in this contract."

(i) The letter agreement of April 15, 1954, a true copy of which is annexed hereto as Exhibit "B", provides that respondent shall annually grant merit increases equal to 4.5 percent of the merit payroll.

(j) Petitioner's position is and has been that the aforesaid salary increases may not be taken from and chargeable to the merit payroll inasmuch as such salary increases are not truly increases based on merit.

(k) The parties are in dispute as to the interpretation and application of the letter agreement of April 15, 1954, incorporated into the current collective bargaining agreement by Paragraph J of Article 18. Such dispute is arbitrable under Paragraph F of Article 20 of the current agreement.

8. The dispute set forth in Paragraph 7 of this petition was processed through the grievance procedure pursuant (6) to the provisions of Article 20 of the current agreement between the parties. The grievance procedure

was exhausted by the parties without their reaching any satisfactory settlement of the aforesaid dispute.

9. Accordingly, on or about August 21, 1956, petitioner demanded arbitration of the aforesaid dispute, pursuant to Paragraph F of Article 20. A true copy of such arbitration demand is annexed hereto and marked Exhibit "C".

10. On or about August 23, 1956, petitioner, in writing, offered to meet with respondent for the purpose of selecting an arbitrator. A true copy of said letter is annexed hereto and marked Exhibit "D".

11. Following said demand for arbitration and an offer to meet to select an arbitrator, respondent requested petitioner to supply respondent with the names of employees affected by the aforesaid salary increases and the remedy which petitioner desired. Petitioner furnished respondent with the information and type of remedy as requested.

12. Despite petitioner's demand for arbitration and offer to meet with respondent to select an arbitrator, respondent has failed, neglected and refused to proceed to arbitrate the aforesaid dispute or to proceed to join with petitioner to selected an arbitrator in accordance with Paragraph F of Article 20 of the current agreement between the parties.

13. Upon information and belief, save for the written agreement for arbitration contained in the aforesaid agreement, annexed hereto as Exhibit "A", this Court would have had jurisdiction, under Title 28, of the subject matter of a suit arising out of said controversy between petitioner and respondent.

(7) 14. Petitioner has made no previous application to this or any other Court for the relief sought herein.

WHEREFORE, petitioner prays for an order directing respondent to proceed with the arbitration demanded by petitioner on August 21, 1956, and to proceed with petitioner to select an arbitrator, in accordance with the terms of the arbitration agreement contained in the current collective bargaining agreement between the parties.

Exhibit B Annexed to Petition

(9) April 15, 1954

Dear Mr. Taft:

It is hereby agreed that the Employer shall grant annually merit increases (including promotions as in the past) equal to 4.5% of the merit payroll. The merit payroll is defined as the average payroll including the salaries as of March 15th and as of September 15th of all Class I employees and all Class II employees who are at or above the standard salary for their classification.

Very truly yours

SPERRY GYROSCOPE COMPANY
Division of The Sperry Corporation

R. M. CLARK
Engineer Personnel Representative

Exhibit C Annexed to Petition

(10) August 21, 1956

Mr. R. M. Clark, Engineering
Personnel Representative
Sperry Gyroscope Company
Division of Sperry-Rand Corp.
Great Neck, N. Y.

Dear Mr. Clark:

In accordance with Article 20, Paragraph F of our current Agreement, the undersigned, on behalf of the Engineers' Association, herewith requests arbitration of the following Association-Employer grievance:

In Department 5282, the Company has been requesting a number of Class I employees to consent to being transferred to Pasadena, California on a customer assignment. Those employees who have been requested to consent to the transfer have been promised raises in salaries running from 6% to 12% in addition to relocation expenses. Those employees who have already been transferred to Pasadena, California in connection with this customer installation have been accorded salary raises in addition to their relocation expenses.

The Department Supervisor has notified the Engineers' Association Representative that such salary increases shall be taken from the "merit payroll" provided for in the letter of agreement, dated April 15, 1954 and made a part of the Agreement by Paragraph J of Article 18.

The Engineers' Association does not object to the Company transferring personnel wherever the needs of the Company dictate. Nor does the Engineers' Association object to payment of relocation expenses inasmuch as our Agreement provides for such payments (see Article 23).

However, the Engineers' Association does object to the Company giving salary increases to Class I personnel, when such increases are not merit increases but are based entirely upon the employee's consent to being transferred to California and the Engineers' Association objects, further, to the Company charging such salary increases against the "merit payroll".

You recognize, of course, that the Company has obligated itself to grant annually merit increases equal to 4.5% of the "merit payroll". If incursions into the "merit payroll" are to be made for purposes other than merit increases, it is obvious that there will less of the "merit payroll" available for the purpose set forth in the contract; namely, the granting and payment of merit increases.

Our agreement, in Article 18, Paragraph H, provides for salary increases to be "on a merit basis *only*". Increasing an employees' salary merely because he consents to being transferred is predicating such salary increase upon a basis which is wholly unconnected with merit. Such increases are, therefore, not "on a merit basis only".

(11) Since such salary increases are patently on the basis of employees consenting to being transferred to California rather than "on a merit basis only", it is the Association's position that:

(1) Such increases cannot trench upon the "merit payroll" which is reserved for the payment of merit increases and not for salary increases of a different sort which are here involved, and

(2) Such increases may be effectuated only as the result of agreement between the Company and the Engineers' Association.

Exhibit C Annexed to Petition

The Association charges that, by unilaterally granting salary increases based entirely upon a Class I employees' consent to be transferred to California and by charging such salary increases to the "merit payroll", the Company is violating Article 18, Paragraphs H and J, as well as Article I of the current Agreement between the parties.

The Company's action and the Association's position with respect to such action raise a dispute and difference as to the interpretation and application of these provisions of the Agreement. Exhaustion of the grievance procedure has failed to resolve this dispute and difference. Therefore, in accordance with Article 20, Paragraph F of our Agreement, such dispute and difference are to be resolved by arbitration.

The Engineers' Association submits the following issue to arbitration, which is raised by the foregoing dispute:

> "Is the Sperry Gyroscope Company, Division of Sperry Rand Corporation, violating Article 18, Paragraphs H and J of the current Agreement between the Company and the Engineers' Association by unilaterally granting salary increases to Class I employees in Department 5282 on the basis of such employees consenting to being transferred to a customer installation in Pasadena, California and, further, by charging such salary increases to the 'merit payroll'?"

The undersigned is ready to join with you to select an Arbitrator to resolve our dispute.

Very truly yours,

/s/ CHARLES N. HALL
President of Engineers' Association

Exhibit D Annexed to Petition

(12) August 23, 1956

Mr. R. M. Clark, Engineering
Personnel Representative
Sperry Gyroscope Company
Division of Sperry Rand Corporation
Great Neck, L. I.

Dear Bob:

I would like to meet with you at your earliest convenience, and within the limits set by the current contract in order to select an arbitrator for Grievance #42-56, involving transfers to Sperry-Utah Division.

Very truly yours,

ENGINEERS ASSOCIATION

JOHN CAMPBELL,
Chairman Grievance Committee.

Answer to Petition

(14) ROBERT M. CLARK, being duly sworn, deposes and says:

I am employed by Sperry Gyroscope Company (herein called "Sperry") a division of Sperry Rand Corporation, in the capacity of Employee Relations Supervisor. Sperry Rand Corporation is a corporation duly organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of New York. It has its executive offices at 30 Rockefeller Plaza, in the County and State of New York. Sperry's plant for the manufacture of various items for the armed forces is located at Great Neck, New York. It is my duty in my position as Employee Relations Supervisor to handle industrial relations among engineering personnel and particularly to handle such relations with a collective bargaining unit in which the employees are represented by a union known as the Engineers' Association (herein called the "EA") and the facts stated below are known to me personally.

Sperry and the EA have had collective bargaining relations for many years. The contracts between them have authorized the granting of merit increases and have contained the following provision:

> (15) "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer . . .."

Nevertheless, the EA has filed a grievance (with respect to which it here seeks to compel arbitration) relating to merit increases. It claims that the Company gave to 19 employees merit increases which should not have been given. While it does not deny that these employees merited the increases, it asserts that Sperry gave the increases

for reasons unrelated to merit and should therefore take them back from the employees.

I shall show below that arbitration should not be directed because (1) the EA has demanded arbitration and filed its petition in this Court before the grievance procedure has complet d its operation, and (2) the arbitration clause of the contract does not provide for arbitration of the grievance here involved. In connection with the second point, I shall demonstrate that the arbitration and merit review provisions of the contract have a lengthy history running through several contracts which compels the conclusion that the parties intended to have arbitrated only bona fide disputes and that the instant grievance does not raise such a dispute.

Sperry is in the process of opening a new plant called Sperry Utah Engineering Laboratory (herein called "Sperry Utah") which will require the services of a large number of engineers and other personnel. The Sperry Utah operation is not covered by the collective agreement between the EA and Sperry.

Insofar as jobs with Sperry Utah have been or will be offered to employees of Sperry, it is the ideal procedure to offer each job to an employee who, at the time of the offer, was filling a position or exercising responsibilities (16) just below that offered to him at Sperry Utah but which his training, experience and present performance have indicated that he is capable of fulfilling. That is not always possible, however, and in some cases positions at Sperry Utah have been offered to present employees of Sperry who already have been occupying at Sperry the same positions with the same degree of responsibility. Those employees of Sperry who were offered and accepted positions in higher classifications were, of course, promoted and received promotional increases. (At Sperry, promotional increases have always been included within

the merit increase category.) Those who accepted jobs at Sperry Utah calling for added responsibility also received merit increases. But each employee who accepted a job at Sperry Utah which was the same as that he occupied at Sperry and in which the responsibility was not sufficiently greater to warrant a merit increase received no increase at all. No employee received an increase because a transfer to Sperry Utah was involved; increases were granted only where the new jobs justified the higher rates.

Nevertheless, the EA filed a grievance (annexed hereto as Exhibit "1") challenging these merit increases as not having been granted for merit and objecting to the inclusion of the amounts in the minimum merit increase guarantee for the entire bargaining unit of 4.5% of payroll. The latter objection had no practical meaning since, even excluding such increases, the aggregate merit increases during the merit computation year just passed far exceeded the minimum guarantee and it is highly likely to do as well during the current year.

(17) The Company pointed out to the EA that, had the plant in Salt Lake City been ready, the engineers in question would immediately have moved there and received the increases upon arrival so that the EA contract would have no application whatsoever. It was only the fact that the physical plant was not ready that delayed the movement of the employees and resulted in their receiving the increases while still at Great Neck. Since but a small number of persons were involved and the situation would not recur after completion of the plant, the grievance lacked any real significance. Upon these considerations the EA's Grievance Committee agreed to settle the grievance without going into the substance of the matter, but subject to approval of other organs of the EA.

The Company filed an answer reflecting this settlement (annexed hereto as Exhibit "2") on the understanding that, should the EA fail to ratify the settlement, the Company would then address itself to the content of the grievance under the grievance procedure.

The EA's Executive Committee approved the settlement but its Representatives Council rejected it for reasons also unrelated to the substance of the grievance. (The Company had declined to introduce to EA representatives new employees hired directly for Sperry Utah who were temporarily at Great Neck awaiting the completion of the plant.) Sperry was notified of the rejection on August 21, 1956.

That same day, before the holding of the grievance session required by the contract and before Sperry had had an opportunity to submit an answer directed to the substance, the EA sent in a premature demand for arbitration (Exhibit C to Petition) followed up by a request to designate an (18) arbitrator (Exhibit D to Petition). An informal conference was held on August 24, 1956 and the formal grievance session required by Section 1(b) of Article 20 of the collective agreement was held on September 4, 1956.

In the discussions between Company and Union representatives at the formal grievance session, it was pointed out by the Company that the EA had never indicated whose increases it was objecting to nor the relief which it sought. The EA agreed to submit this information in writing and the Company agreed to submit its written answer to the grievance upon receipt from the EA of the requested information in writing. In accordance with this arrangement, the EA, under date of September 13, 1956, submitted a list of names of employees who had received merit increases which it claimed fell within its grievance (see Exhibit "3" annexed hereto). Under date of Sep-

tember 17, 1956, it stated in writing the relief it sought (see Exhibit "4" annexed hereto). This statement was described by the EA in the document as "Addendum II to Grievance #42-56." However, the relief stated therein differed from that which it had requested verbally at the grievance session. It was, therefore, necessary to seek clarification of the demand for relief, which the Company promptly did (see Exhibit "5" annexed hereto). Under date of September 19, 1956, the EA mailed its reply to Sperry (see Exhibit "6" annexed hereto). For the first time, the Company was in a position to file an answer directed to the substance of the grievance, and this it did on October 1, 1956, well within the two week period allowed by the contract (see Article 20, Section 1(b)). The answer is annexed hereto as Exhibit 7 and its contents made part hereof as though set forth in full.

(19) However, the petition herein was verified four days before the answer was filed and was received at Sperry corporate offices on the same day as that on which the answer was filed at the plant. It is obvious that the EA neither considered nor was it interested in the Company's answer when it made its demand for arbitration and when it prepared and served its petition. It failed even to go through the motions of reading the answer and assumed in advance that it would reject it. This is not in compliance with, and exhaustion of, the grievance procedure which is required by the contract.

I shall now proceed to show that the grievance here involved does not fall within the scope of the arbitration clause contained in the collective agreement because it fails to raise a bona fide dispute. Both the interpretation of the merit increase provisions and the arbitration clause have been the subject of prior disputes and litigations between the parties and the contract has twice been renewed since then. Patently that prior history has cogent bearing upon the proper interpretation of these clauses.

I shall review the history of the contractual provisions here involved commencing with the contract which went into effect in 1950.

After the 1950 contract was negotiated but prior to ratification by the membership (which did take place subsequently), the EA Negotiating Committee distributed a "Contract Summary" dated December 26, 1950. Under the heading "Article XIV" the following appears:

(20) "*Present*—Establishes wage rates and operation of merit system on Company controlled basis. *Proposed*—by E.A., to establish new wage rates and merit system as follows:

• • •

D. Merit review to continue, with forms, policies and procedures made public.

E. Results of merit review made known prior to effective date. Employee complaints may result in grievance for reasons of personal discrimination.

• • •

New— Wage rates and merit system to be as follows:

• • •

E. Merit review to continue with forms, policies and procedures made public.

F. Results of merit review made known prior to effective date. Raises given solely at Company's discretion, without recourse to grievances, as at present."

Thus, the EA had proposed that the Company's sole discretion in merit reviews be eliminated in favor of a right

to challenge the Company's action. This proposal was, however, rejected. The clause providing that "merit increases are at the sole discretion of the Employer" continued in the contract.

The policies governing merit review which, pursuant to the collective agreement, were distributed to each member of the bargaining and called for merit increases based upon

1. "obviously improved on-the-job performance"
2. "a change to a higher classification"
3. employees' "receiving equitable compensation for the duties and responsibilities then assigned".

The third factor encompasses two items: (a) an increase in duties and responsibilities not sufficient to result in a higher classification, and (b) a salary comparison with other employees fulfilling the same duties and responsibilities.

(21) While the EA has acknowledged that merit increases are granted in the sole discretion of the Company, it has consistently criticized these increases as being (a) too small in amount, (b) too large in amount, or (c) both too small and too large at the same time.

Thus, The Sperry Engineer, official EA newspaper, in March 1953 criticized the October 1952 semi-annual review as having been too small:

> "1952 Merit Review:
>
> A Little For A Few
>
> The extent to which the hearty handclasp, the friendly pat on the shoulder, and the 'Well done, old man' was used as a substitute for soft, welcome cash is strikingly revealed in the report of the Statistical Committee on Merit Raises."

Just two months later, the same publication criticized the April 1953 review for having granted too many increases (p. 2, column 1).

In the same issue, Everett Taft, then President of the EA, wrote the following as his criticism of the merit review provisions of the collective agreement:

> "If I were required to supply a single, convincing token of the skill with which the Sperry engineering officers and policy makers have handled our Union I would offer the following from Article XIV, Section C.1,b, of our current contract: 'The Employer's present semi-annual merit review practice . . . shall be continued in full force and effect for the duration of this Agreement . . . It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer and failure to receive such increase shall not be deemed a grievance subject to the grievance and arbitration machinery herein set forth.'
>
> "This is a good specimen of the company-dominated, unilateral Merit Review. It has an iceberg-like potential—most of it is out of view—which is not generally appreciated, but no better engine for by-passing, and temporarily rendering impotent, timid Unions has yet been devised."

(22) In the April 1953 merit review, the increases granted to various individuals differed in amount and large number of employees in the bargining unit received no increases. The EA accused the Company of having used the merit review to "distort the contract's salary structure" (leaflet dated May 25, 1953). This is another way of saying that while some employees received merit increases, others did not. Yet, the EA also made the inconsistent charge that the Company had granted a

"general wage increase"—implying that all employees had received an increase in the same amount. The same leaflet quoted above went on to say:

> "The contract's assertion that, 'The Employer's present semi-annual merit review practice . . . shall be continued in full force and effect for the duration of this Agreement.', does not entitle management to expand its 'sole discretion' (as to which individuals have really improved their on-the-job performance) into a blanket authority to by-pass the Union and distort the contract's salary structure.
>
> "EA's vigorous objection to this management usurpation of our prerogative is not to be construed as any disparagement of the merit philosophy. We have conceded that, for the duration of this agreement, the Employer determines merit at his sole discretion. Further, we have agreed that his decisions with respect to the merit of individuals is final and not subject to the Grievance Procedure. We have asserted that we wished to have all of the individual merit of each worker recognized, now and in the future. We have not, however, granted the Company the right to take over from the Union our prerogatives in collective bargaining."

What this doubletalk says is that the Company has sole discretion to pass upon merit and the EA cannot challenge the granting or denial of an increase in any specific case, but that if the EA dislikes a merit review, it can challenge all of the increases as a whole and thus accomplish what it is directly forbidden to do.

And in the June 1953 issue of The Sperry Engineer, Everett Taft, the EA President, continued that criticism as follows:

(23) "When the Union agreed that the supervisor was the logical authority to determine an individual employee's merit rate, it made the natural assumption that the supervisor's discretion would apply to the individual's performance. Who would have thought that in acknowledging the supervisor's right to determine an individual's merit rate, the Union would be confronted with a usurpation of its right to bargain salary ranges, general increases and group inequity adjustments? But, having once gotten an element of the supervisor's judgment into the act, management immediately invokes the sacred power of supervisor's discretion and, in effect, tells the Union that it can drop dead."

Despite this series of criticisms to the effect that the merit review had been too generous, the November 1953 issue of The Sperry Engineer criticized the Company for keeping the merit increases at too low a level. It declared:

"As long as Sperry refuses to place the Merit Review on an honest evaluation of on-the-job performance, and continues to hold merit increases to the bare minimum necessary to keep angry reverberations down to the level of a low rumble, so long will the Merit Review remain unsatisfactory. And the Company shows no sign of altering its policy."

On June 25, 1953, the EA filed a grievance alleging that the Company had used the merit review to grant increases unrelated to merit and demanded that those who had received no increases be granted them to restore the prior salary structure. When it sought to arbitrate this grievance, the Company moved for a stay of arbitration in the New York Supreme Court on the ground that the grievance could not be arbitrated since it failed to pres-

ent a bona fide dispute. On November 6, 1953, the Company's motion was granted on the ground that the relief sought by the Union could not be granted under the contract (130 N. Y. L. J. 1031, col. 4).

Thereafter, on November 23, 1953, the EA filed a new grievance on the same facts, seeking merely a (24) declaration that the Company had violated the contract by granting increases unrelated to merit. Again, the Company moved to stay arbitration on the ground that no bona fide dispute was present since the Union could not merely by attaching another label to merit increases challenge the Company's sole discretion in granting them. This time the New York Supreme Court reached the substance of the issue and squarely sustained the Company's position in the following opinion (131 N. Y. L. J. 6):

> "Motion to stay arbitration is granted. Petitioner seeks to arbitrate the question of whether the company has violated the provisions of the agreement by granting general wage increases in the guise of merit increases. Only a bona fide dispute is arbitrable (Matter of General Electric Co., 300 N. Y. 262; Albert v. Admiration Knitwear Co., 304 N. Y. 1). There is nothing in the contract which limits wage increases to employees. As to employees in the Class II classification, the contract provides for a minimum and maximum rate, while as to Class I there is only provision for a minimum rate. There is no claim that the company has violated the minimum and maximum provisions of the agreement. Again, apart from a general contention, petitioner has not indicated even one case where it claims the increase granted was not based upon merit. The charge that there was a 'general' increase is wholly unsupported by any proof whatever. The company, on the other hand, has demonstrated that there was

no 'general' increase and that the merit review procedure was followed in granting increases. Moreover, the agreement provides that 'merit increases are at the sole discretion of the Employer'. That discretion is not reviewable (Application of Western Electric Co., Inc., 277 App. Div., 858, aff'd 301 N. Y. 727). Consequently, I find no bona fide dispute here which is arbitrable under the agreement. Settle order."

At that time, Charles Hall, then Chairman of the EA Grievance Committee, and now EA President, wrote the following comment on the arbitration clause in The Sperry Engineer for February 1954:

"First, the union must convince the Court that it has a bonafide dispute before the Court can decide that the stay of arbitration should be granted. The judge, in making such a decision, is saying, in effect, 'The (25) union only thought it had a dispute. In reading the contract I can see that the company has done just what it contracted to do. Therefore, since I think that the contract has not been violated the union is wrong in thinking that it had a dispute.' This is the type of thinking that is logical only to the judicial mind. How can anyone be wrong in thinking that he has a dispute. If he didn't have a dispute the case wouldn't have been in court in the first place. Of course the company justifies itself by saying, 'Now we have been protected from the irresponsible decisions of an arbitrator on a dispute which the union has made out of whole cloth.' The company could have protected itself by not signing the arbitration agreement in the first place. But then, of course, the union would not have signed a no-strike pledge."

The 1950 contract expired on March 1, 1954, and the EA demanded changes both in the arbitration clause and the merit increase clause, directly connected with the disputes just described above. The written demands contained the following:

> "5. Merit Review.
>
> (a) Revision of merit review program to include a fund guaranty as to amount and distribution.
>
> (b) Details of all provisions to be incorporated in Contract.
>
> • • • • •
>
> 14. Grievance and Arbitrative Procedure.
>
> (a) Revision of both Association and Employee Grievance and Arbitration Provisions in accordance with specific written proposals that will be submitted.
>
> (b) Arbitrator to be given power to determine arbitrability rather than the Courts, and and same arbitrator shall hear both issue of arbitrarily and basic issue at same session."

The discussion by Charles Hall with respect to arbitration clauses shows that he was fully familiar with the prevailing interpretation of these clauses and that the proposed change was to avoid that result by precluding an application to the courts for a stay of arbitration.

(26) In The Sperry Engineer for January 1954, the EA described the merit review demands as follows:

> "In its Demands upon the Company, EA is asking for certain improvements in the Merit Review

structure. These are: inclusion of an adequate fund guaranty (merit kitty), and specification—in detail —of all Merit Review provisions, in the new contract. The basic purposes of this demand are to ensure for the first time: (1) the existence of a Merit Review based on merit only; and (2) the knowledge, on the part of the membership, of how the system works."

During the negotiations, the EA insisted that the criteria upon which merit increases could be granted be spelled out in the contract so that a check could be made upon Company compliance with those criteria. Its proposed arbitration clause was as follows:

"(1) If the Union and the Company fail to settle by negotiation any difference or dispute between them arising out of, pertaining to or involving the interpretation, meaning, application, performance or operation of any of the provisions of this contract, such difference or dispute shall be referred upon written demand of either party to an impartial arbitrator mutually agreeable to the parties.

"(2) Neither the Union nor the Company shall take any steps or inaugurate any proceedings, legal or otherwise, to stay the arbitration of any such difference or dispute, except and exclusively for the following reasons:

(a) That the grievance procedure has not been exhausted, provided that the matter is one involving a grievance under this agreement.

(b) That the difference or dispute is expressly and specifically excluded from arbitration by express terms in the contract. Unless the contract ex-

pressly provides that a specified difference or a specified dispute involving the interpretation, meaning, application, performance or operation of a particular provision is excluded from arbitration, no such difference or dispute shall be considered by a Court or otherwise as non-arbitrable."

The Company rejected the arbitration demand entirely, insisting that it would not agree to arbitrate any dispute which the EA desired to submit but only those which, if (27) the Company objected, would be found by a court to be bona fide. Sperry agreed to an overall minimum guarantee for merit increases, but otherwise rejected the EA demands in that area. After a strike called by the EA failed, a contract was executed embodying the Company's position on these subjects. This contract expired on March 14, 1956.

The strike settlement memoranda provided only for the following change in these areas:

"Company guarantees that a minimum of 4.5% of the merit payroll will be granted annually through merit increases (including prmotions as in the past)."

The problem of too much and too little continued during the 1954-1956 contract term to draw the attention of EA statements on the subject. In the October 1954 issue of The Sperry Engineer, the EA listed the following complaints:

"Merit review is an unenviable task and yet our immediate supervisors have to devote a considerable amount of time and effort to it. It would be unreasonable in the extreme to assume that, on the whole, all this activity is directed toward the pro-

duction of anything but a fair and equitable merit review. Stated positively, it may be said with justification that the overwhelming majority of the supervisors at Sperry are doing their best to be fair and honest in rating their people.

"Why, then, is there so much dissatisfaction with the merit review system? Why is it that the mere words, 'merit review', are often enough to anger an employee, to evoke derisive remarks from him? The answers to these questions are, quite possibly endless, but one of the most obvious ones is suspicion.

• • • • •

"Far more questions are raised than are answered. This relative lack of information on the subject has engendered considerable cynicism on the part of many employees which is made particularly regrettable by the fact that the system is basically sound and fair.

"One of the biggest problems in any merit review system is the detection of bias in supervisory judgment. Human nature and fallibility being what they are, some mistakes are bound to (28) be made. This problem is made doubly difficult by the fact that failure to rank a man high enough, or to speak strongly enough in his favor when the rankings of several sections are merged, would seem to be sufficient to deprive him of a raise. The negative approach of actual derogation need not be taken. What steps are taken at Sperry to prevent or reduce supervisory bias is not known, but there is no reason to doubt that such steps are taken.

• • • • •

> "The third suggestion concerns the use of the merit review system for purposes having no relation to obviously improved on-the-job performance. It contributes little to the confidence of the employees in the merit review system if a particular classification within the overall group is given what amounts to a virtual general increase because of external circumstances unrelated to the merit of those concerned."

On July 22, 1955, the EA issued a leaflet, again complaining that the merit review procedure was used to grant a "general wage increase", although the only meaning that can be ascribed to the latter term is that the EA disapproved of the manner in which merit increases were awarded:

> "According to R. M. Clark, 'Company policy with respect to Merit Reviews is that following such review employees will be receiving equitable compensation for the duties and responsibilities then assigned.' Why is it that only two months after the last review so many glaring inequities exist?
>
> • • • • •
>
> "What EA wants to know is: What happens to the 4½% merit review kitty when the merit review is used to adjust general wage levels?"

On August 29, 1955, the EA published a leaflet quoting the following from a Sperry announcement:

> "In order to recompense each of you properly we have, each year, two complete merit reviews—one in April and the other in October. In addition we have merit increases and promotions during the periods in between these two specified reviews. We

are giving some merit increases between the April 1955 and the October 1955 reviews. We probably will, as in the past, give other merit increases between the October 1955 and the April 1956 reviews."

(29) The EA then proceeded to complain that while the announcement implied that everything was normal, the statistics on merit review were a "straw in the wind" that there was a process of "salary compression at Sperry" by which it meant that lower salaries were being brought closer to higher salaries.

These objections to the merit review system were repeated and expanded in the October 1955 issue of The Sperry Engineer. The EA there stated that:

> "One complaint is that Sperry obviously bases the Merit Review on criteria other than merit. The most glaring example was in the spring of 1953. Unless many supervisors are lying, this performance is being repeated in the review now in progress. The November review should be a big one.
>
> • • • • •
>
> "A second complaint is based on the fact that the Merit Review is the procedure by which salary leveling has been introduced. Supervisors have the knowledge and responsibility to rank-order their employees. Generally speaking, they accomplish this difficult task conscientiously and fairly. Once rank-ordered, however, the employees must be matched to a salary curve which has no inherent relationship to merit or worth. The curves have been manipulated by Sperry to compress the salary ranges.
>
> • • • • •

"The fundamental requirement of a successful merit review system is good faith on both sides. There are, however, specific safeguards which EA seeks to gain including the following:

1. Merit Review kitty. This assures adequate scope for the recognition of merit.

2. Arbitrability of gross application of non-merit criteria, e.g., the April 1953 review.

3. Contract clauses to correct and reverse salary leveling.

4. Negotiation of all general wage level changes.

5. Job evaluation. Accurate, up-to-date job evaluation would expose distortions of merit review."

Under item numbered "2" above, the EA stated that it would seek the right to arbitrate situations in which it applied (30) a label other than merit to an increase, a right it was held not to have in the 1953 litigation, a right it failed to get in the 1954 negotiations, a right it recognized in the foregoing statement that it did not have—and a right which it sought in the 1956 negotiations through a change in the arbitration clause and which it failed to get. Yet, here is the EA seeking to secure that right through an arbitrator.

In the November 1955 issue of The Sperry Engineer, the EA complained on the one hand (p. 2) that supervisors were not explaining to employees who failed to receive a merit increase why they had failed, and, on the other, that too much had been handed out in merit increases:

"It is obvious that 'merit increases' were more generous this time than is common in most re-

views. It is also obvious, if the 'interim reviews' are included and a very few exceptions excluded, that 'merit increases' were given across-the-board.

* * * * *

"In making a general wage adjustment under the guise of a merit increase, the Company eliminates the necessity of negotiating a change in rate ranges so long as it stays below the contract maximum for a particular job."

I have pointed out above that during the 1956 negotiations the EA sought no change in the merit review clause of the contract. Instead, it concentrated its fire on the arbitration clause. Its demand in that respect was as follows:

"*F. Group Assurance*

1. Arbitration.—Question of arbitrability to be decided by arbitrator rather than by courts."

In the December 1955 issue of The Sperry Engineer, the following explanation of the EA position on the arbitration clause appears:

"The courts, jealous of the activities of commercial arbitrators have made such amazing declarations as 'If the meaning of the provision (31) of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the the contract cannot be said to provide for arbitration.' (The Appellate Division in the case of International Association of Machinists v. Cuttler-Hammer, Inc., 1947.)

"Privately the Company has described the union's attempt to use this hard-bought provision as 'at

tempting to obtain through arbitration what they failed to get in contract negotiations.'

* * * * *

"Apparently the only way to write an arbitration clause so that it means what it says is to specifically prohibit the Company from applying to law courts for the purpose of short-circuiting the arbitration machinery. Such a clause might contain the sentence 'Arbitrators shall have the exclusive right to determine arbitrability.' Above all it must be understood that the right to arbitrate and the no-strike pledge are reciprocal benefits for the sake of industrial harmony—without true guarantee of the first, the second cannot in good faith be demanded."

It will be noted that this is the same position which the EA presented and which was rejected in the 1954 negotiations. Again, it is clear that the EA fully understood the interpretation of the arbitration clause as permitting arbitration only of bona fide disputes. This rule it unsuccessfully sought to change in negotiations.

On January 16, 1956, there was an extensive discussion of the EA demand with respect to arbitration. Charles Hall, EA President, argued that the EA had given up the right to strike in return for the right to arbitrate (although this could not be true in the light of the 1954 negotiations). He further declared that the EA did not trust judges to pass upon labor matters and that arbitrators were more experienced in them.

Mr. Gordon, on behalf of Sperry, denied that arbitration had been agreed upon in return for the no-strike clause. He further pointed out that a motion to stay (32) arbitration was faster and less expensive than an arbitration proceeding. He declared, too, that under the 1950

contract, the EA brought several arbitration proceedings which it later admitted had been brought for "educational" purposes to show what it believed was wrong with the collective agreement, knowing full well there had been no violation of the contract. Mr. Hall replied that there had only been two such cases in nine years, but the Company representative stated that the number had been kept down only because a remedy existed and the Company would not surrender that remedy.

Mr. Henry Mayer the EA attorney, then inquired as to the Company's willingness to let one case as to arbitrability be decided by an arbitrator for every one decided by the courts. He received a negative reply. Mr. Mayer concluded his discussion by saying that the merit increase problem had hurt the EA severely and that some relief from the Company's discretion was required.

The discussion was repeated in part on January 23, 1956 and again Sperry rejected the EA position on this demand.

The present contract was subsequently agreed upon in which the EA demand with respect to arbitration was rejected.

The provisions relating to Company discretion in granting merit increases and to arbitration have remained unchanged through three contracts. Under the first, the EA began its practice of placing other labels upon merit increases and then, by virtue of its label, seeking arbitration. This was held to be inconsistent with the Company's sole discretion. In the face of this history, the EA has sought in two negotiations to change the (33) arbitration clause to free itself of the rule that only bona fide disputes as interpreted by a court could be arbitrated. It sought once to change the merit review clause, although it is clear that its attack upon the arbitration clause was an indirect attack upon the merit review clause.

In the light of the long history of these clauses, it is clear (1) that the EA cannot challenge merit increases merely by placing foreign labels upon them, and (2) that it can only arbitrate bona fide disputes and that such a dispute does not exist merely because the EA has labeled a merit increase with another name.

The history of the instant grievance, as told by the EA, is revealing with respect to the manner in which these labels are created and thrown about. The June-July 1956 issue of The Sperry Engineer describes the genesis of the instant grievance as follows:

> "The May Merit Review was a crushing blow for the department [5282] members. Only 3 out of 60 Class I employees received merit increases. These three had not been considered for relocation. Evidently, the lot of a man who must stay behind because of personal reasons is not going to be a happy one.
>
> "The EA Grievance Committee moved into the picture quickly as outraged members of Department 5282 demanded an end to these pressure tactics. An EA grievance was filed, and a meeting was held on June 5th to air the matter before Company representatives."

Thus, the grievance originated in the feeling, not that increases had not been granted for merit, but that increases had been withheld from other persons (which was incorrect for the increases to those transferring to Sperry-Utah in no way affected persons not transferring).

The EA President, Mr. Hall, had the following remarks to make with respect to the problem:

> (34) "It is easy to see how a supervisor, on one side, might reason that a man's willingness to ac-

> cept added responsibilities at some remote location would be a factor in determining his merit. It is also easy to see, on the other side, that a man who is offered an increase in responsibilities with a corresponding increase in salary would feel that the location in which he is willing to take on this added load and increased salary has nothing to do with his on the job performance. It is quite clear that a salary increase dependent on a man's willingness to move is a transfer bonus and not a merit increase."

The last sentence quoted is patently a non-sequitur since an increase given to an employee who accepts added responsibility at another location cannot arbitrarily be allocated to the location rather than to the added responsibilities, particularly when many who agreed to relocate received no increase at all (because they received no increase in responsibility sufficient to warrant an increase in pay).

However, the EA wanted to file a grievance on the alleged complaint that increases had been withheld. The contract forbids not only arbitrating claims that merit increases had been improperly denied but also filing grievances on such claims. Therefore, the EA determined to switch the claim around and, instead of grieving for persons who had not received increases, it grieved about the granting of such increases to others (who were leaving the bargaining unit anyway) thereby (1) using the grievance for propaganda purposes within the bargaining unit (i.e., what it calls an "educational" purpose), and (2) hoping to apply pressure on the Company in favor of those who had not received merit increases.

Thus, the EA has charged that the Company gave merit increases, not for merit, but as a transfer bonus. This (35) charge was made not because the EA believes it, but

because the EA wanted to "do something" for employees who did not receive a merit increase and felt that the instant grievance was the only way it could do so.

This is precisely the kind of grievance that the parties discussed during negotiations earlier this year and against which the Company insisted upon being protected by retaining the prior arbitration clause under which only those disputes found by a court to be bona fide could be arbitrated.

Wherefore, respondent requests that the petition be denied with costs and disbursements.

Exhibit 1 Annexed to Answer to Petition

(36) STATEMENT OF GRIEVANCE

between

THE ENGINEERS ASSOCIATION

and

SPERRY GYROSCOPE COMPANY
Division of Sperry Rand Corporation

Grievance No. 42-56

To: Sperry Gyroscope Company, Division of Sperry Rand

Attention R. M. Clark, Engineering Personnel Representative

Signed /s/ John M. Campbell Date May 31, 1956

(37) GRIEVANCE #42-56

In Department 5282, the Company has been requesting a number of Class I employees to consent to being transferred to Pasadena, California on a customer assignment. Those employees who have been requested to consent to the transfer have been promised raises in salaries running from 6% to 12% in addition to relocation expenses. Those employees who have already been transferred to Pasadena, California in connection with this customer installation have been accorded salary raises in addition to their relocation expenses.

The Department Supervisor has notified the Engineers' Association Representative that such salary increases shall be taken from the "merit payroll" provided for in the letter of agreement, dated April 15, 1954 and made a part of the Agreement by Paragraph J of Article 18.

Exhibit 1 Annexed to Answer to Petition

The Engineers' Association does not object to the Company transferring personnel wherever the needs of the Company dictate. Nor does the Engineers' Association object to payment of relocation expenses inasmuch as our Agreement provides for such payments (see Article 23).

However, the Engineers' Association does object to the Company charging salary increases against the "merit payroll", when such increases are not merit increases but are based entirely upon the employee's consent to being transferred to California.

You recognize, of course, that the Company has obligated itself to grant annually merit increases equal to 4.5% of the "merit payroll". If incursions into the "merit payroll" are to be made for purposes other than merit increases, it is obvious that there will be less of the "merit payroll" available for the purpose set forth in the contract; namely, the granting and payment of merit increases.

Our Agreement, in Article 18, Paragraph H, provides for salary increases to be "on a merit basis *only*". Increasing an employee's salary merely because he consents to being transferred in predicating such salary increase upon a basis which is wholly unconnected with merit. Such increases are, therefore, not "on a merit basis only".

Since such salary increases are patently on the basis of employees consenting to being transferred to California rather than "on a merit basis only", it is the Association's position that:

> Such increases cannot trench upon the "merit payroll" which is reserved for the payment of merit increases and not for salary increases of a different sort which are here involved.

Exhibit 1 Annexed to Answer to Petition

The Association charges that, by unilaterally granting salary increases based entirely upon a Class I employee's consent to be transferred to California and by charging such salary increases to the "merit payroll", the Company is violating Article 18, Paragraphs H and J, as well as Article 1 of the current Agreement between the parties.

Exhibit 2 Annexed to Answer to Petition

(38) June 28, 1956

Subject: Answer to Grievance No. 42-56

To: Messrs. C. N. Hall and J. M. Campbell
Engineers Association
2022 Hillside Avenue
New Hyde Park, New York

Gentlemen:

It is understood that E.A. Grievance No. 42-56 is settled on the basis that the salaries of employees accepting positions with the Sperry Utah Engineering Laboratory are not to be considered as being on the E.A. merit payroll and that their increases are not chargeable against the merit payroll provided for in Article 18, paragraph j. of the current Agreement.

This is without precedent as to whether or not the increases granted are merit.

Very truly yours,

SPERRY GYROSCOPE COMPANY
Division of Sperry Rand Corporation

R. M. Clark
Employee Relations Supervisor

RMC:dm

Exhibit 3 Annexed to Answer to Petition

(39) ENGINEERS ASSOCIATION

2022 Hillside Avenue
New Hyde Park, New York

September 13, 1956

Mr. L. Oestreicher
Sperry Gyroscope Company
Great Neck, L. I.

Dear Sir:

Enclosed please find list of persons who received a Merit Increase—in connection with Grievance #42-56.

Very truly yours,

ENGINEERS ASSOCIATION

/s/ John Campbell
ms

JOHN CAMPBELL, Chairman
GRIEVANCE COMMITTEE.

JC:ms
Enclosures (2).

Exhibit 3 Annexed to Answer to Petition

(40) List of Employees Given Wage Increases by Company Because Employees Accepted Company Offer to Relocate.

Name	*Life #*
E. Bingle	64839
C. Butter	79559
J. Cherouny	63129
J. Conway	88687
R. Elkins	89669
L. Egan	94672
J. Hart	88719
J. Jackson	64719
T. Kelly	29732
T. Mumme	74447
N. Petersen	74921
R. Ploch	86525
J. Remmes	18856
R. Schabowsky	86525
C. Waters	85202
B. Adams	88102
L. Hillman	07967
D. Lawless	65687
F. Ballard	17369

This list accompanies Grievance #42-56.

Exhibit 4 Annexed to Answer to Petition

(41) ENGINEERS ASSOCIATION

2022 Hillside Avenue
New Hyde Park, New York

September 17, 1956

Mr. Lou Oestreicher
Sperry Gyroscope Co.
Great Neck, L. I.

Dear Mr. Oestreicher:

Addendum II to Grievance #42-56

Following is the remedial action required for Grievance #42-56.

1) That the contract should be observed in all respects by the Company as well as the union.

2) That the Company cease and desist from unilaterally granting increases which are not merit and which therefore, are in violation of our contract.

3) That the Company acknowledge that the subject increases are not merit increases.

4) That the subject increases shall not be credited to the merit payroll to which merit increases *only* are properly chargeable.

Sincerely,

ENGINEERS ASSOCIATION

/s/ Charles N. Hall
CHARLES N. HALL,
President.

CNH:ms

Exhibit 5 Annexed to Answer to Petition

(42)

September 18, 1956

Mr. Charles N. Hall, President
Engineers Association
2022 Hillside Avenue
New Hyde Park, Long Island, New York

Dear Mr. Hall:

This will acknowledge receipt of your letters of September 13, 1956 and September 17, 1956. At the final discussions of the grievances involved, the Union representatives stated two simple propositions:

1) That certain individuals who received merit increases did not merit such increases and that the Union would supply a list of names so that we may know who such individuals are, and

2) That the remedy sought by the Union was that these increases be retracted from such employees.

The Union agreed to send us the above list together with a written request that these increases be withdrawn. Since that meeting we have had two equivocal, evasive letters (one of which contained a list of employees) leaving us in some doubt as to what the Union's position is. I would appreciate your answer as to whether the Union still believes that the employees listed (1) did not merit the increases granted, and (2) whether the Union still desires that we retract the increases granted.

Very truly yours,

SPERRY GYROSCOPE COMPANY
Division of Sperry Rand Corporation

/s/ Louis Oestreicher
Louis Oestreicher
Employees Relations Manager

LO:jar

Exhibit 6 Annexed to Answer to Petition

(43)

ENGINEERS ASSOCIATION

2022 Hillside Avenue
New Hyde Park, New York

September 19, 1956

Mr. L. Oestreicher, Employee
Relations Manager
Sperry Gyroscope Company
Great Neck, L. I.

Dear Mr. Oestreicher:

This will acknowledge receipt of your letter of September 18th in which you pose two questions. In this letter you have characterized the Association's position as evasive. The issue we have submitted regarding your contract violations is as clear as a bell. Our letter of August 21st sets forth our claims sufficiently and completely. All your comments and statements during the discussion of this grievance indicate that you are fully familiar with the nature of the Association's claim. We believe that the belated characterization you are attempting to fasten on to our position is purely self-serving, and we further believe that you are equivocating and delaying for the purpose of avoiding arbitration.

The Company has misstated the issue. It is the union's position that the Company may not unilaterally grant wage increases to employees when such increases are palpably not merit increases. Accordingly the subject increases, which were given by the Company unilaterally solely because the employees in question were willing to relocate and were not based on the merit factor, are in violation of Paragraph H and J of Article 18 of our current

agreement. The Company misstates the issue when it puts words in the Association's mouth to the effect that the employees in question did not merit increases. The question of the merit of these employees, as such, is not involved.

In view of the fact that the subject increases are not merit increases and were therefore, unilaterally given by the Company in violation of paragraphs H and J of Article 18 of the current agreement, the union's position is that such increases must be retracted. If the Company desires to give wage increases to individuals who comply with the Company's request to relocate, the union is ready to negotiate such increases with the Company.

We request that the Company proceed without delay in the selection of an arbitrator.

Sincerely,

ENGINEERS ASSOCIATION

/s/ Charles N. Hall
CHARLES N. HALL,
President

CNH:ms

Exhibit 7 Annexed to Answer to Petition

(44)

September 27, 1956

ANSWER TO GRIEVANCE No. 42-56

1. Our original answer dated June 28, 1956 to this grievance recites the settlement made with the Grievance Committee. The understanding with the Committee was that, should the Union fail to ratify the settlement, that answer would be withdrawn and another one filed.

2. We have since been informed that, although the Union's Executive Committee recommended acceptance of the settlement, the Representatives' Council has rejected it. Accordingly, pursuant to the understanding previously reached, we submit this answer in lieu of that of June 28, 1956.

3. This grievance claims that the following employees merited increases and received increases but that these increases, instead of having been granted for merit, were granted for an irrelevant factor, namely, because they agreed to relocate:

Name	*Life No.*
E. Bingle	64839
C. Butter	79559
J. Cherouny	63129
J. Conway	88687
R. Elkins	89669
L. Egan	94672
J. Hart	88719
J. Jackson	64719
T. Kelly	29732
T. Mumme	74447
N. Petersen	74921

Exhibit 7 Annexed to Answer to Petition

Name	*Life No.*
R. Ploch	86525
J. Remmes	18856
R. Schabowsky	86625
C. Waters	85202
B. Adams	88102
L. Hillman	07967
D. Lawless	65687
F. Ballard	17369

(45)

4. Of the names on this list, N. Petersen, Life Number 74921, appears to have been included in your list by error since he has been transferred out of the Bargaining Unit to Sunnyvale and he has received no increase.

5. Messrs. B. Adams, Life Number 88102, and D. Lawless, Life Number 65687, each received increases at the April semi-annual review prior to their having been considered for transfer to Sperry Utah Engineering Laboratory in Salt Lake City. At the time these merit increases were granted, no discussions had taken place looking to their being transferred nor were they being considered for transfer and, of course, they had not agreed to any transfer. Their increases were predicated upon their respective performances in the jobs they held at the time of the merit review.

6. The following individuals named in your list received their increases because they were promoted to new classifications:

Name	*Life No.*
E. Bingle	64839
J. Cherouny	63129
L. Egan	94672
T. Kelly	29732

Exhibit 7 Annexed to Answer to Petition

Name	*Life No.*
T. Mumme	74447
R. Ploch	86525
R. Schabowsky	86625
C. Waters	85202

7. The following employees received merit increases because they were assuming higher responsibilities:

Name	*Life No.*
C. Butter	79559
J. Conway	88687
R. Wilkins	89669
J. Harte	88719
J. Jackson	64719
J. Remmes	18856
L. Hillman	07967
F. Ballard	17369

8. We call your attention to the fact that the policies and procedures governing merit reviews, which is distributed to (46) each member of the Bargaining Unit pursuant to the Collective Agreement, provides that merit increases shall be granted ". . . to reflect a corresponding change in duties and responsibilities". We further call your attention to the fact that the policies and procedures for merit reviews have contained such a provision ever since the institution of the publication of these policies and procedures for merit reviews pursuant to the Collective Agreement more than five years ago.

9. You should also be aware that the following employees—just as those referred to in paragraph 6 and 7 above—have agreed to transfer to Sperry Utah Engineering Laboratory in Salt Lake City but they received no increase in connection with the transfer, the relocation, and

the new job because there occurred neither a promotion nor such an increase in responsibility as to warrant an increase in pay at that time. It is obvious, therefore, that the Company does not have and has not had any practice or policy of granting increases because employees undertake to relocate.

Name	*Life No.*
B. Adams	88102
A. Borro	65253
R. Brashear	64356
R. L. Denning	89995
K. Doland	19522
O. Duffy	28370
D. Healy	67083
E. Hungerford	61436
D. Lawless	65687
J. Mahler	66874
R. W. O'Hare	92985
E. J. Petersen	65156

10. Under the Collective Agreement, Article 18, Section E, paragraph 2 (which is applicable by cross-reference in Section H, paragraph 1), merit increases are at the sole discretion of the Company. It is, therefore, improper for you to seek to review the judgment of Company supervisors in passing upon the duties and responsibilities of employees under their supervision. Obviously, if you could review the supervisors' judgment as to the duties and responsibilities borne by employees, the merit increases would no longer be at the sole discretion of the Company as provided for in the contract.

11. You also complain about charging the merit increases involved to the minimum guarantee of 4.5% of

payroll. With respect (47) to those of the increases as to which you object which were made prior to the close of the April semi-annual review, no question concerning the 4.5% guarantee can arise since the merit reviews (excluding the increases to which you object) for that contract year were in excess of 9%. With respect to that portion of the increases includible in the next contract year, the issue is premature since the results for that year are not as yet available, but it is highly improbable that the merit increases for that year, excluding those to which you raise objection, would be less than the minimum guarantee.

Reply Affidavit of Charles N. Hall

(48)

CHARLES N. HALL, being duly sworn, deposes and says:

I am the president of Engineers Association, the petitioner herein.

My affidavit is in reply to the affidavit submitted by Robert M. Clark on behalf of respondent.

Mr. Clark's affidavit urges dismissal of petitioner's application to compel arbitration on the following two grounds:

1. That the application is premature because the grievance procedure was not exhausted;

2. That the dispute between the parties as to whether the increases in question were or were not "merit" increases is not arbitrable.

My affidavit will demonstrate that both of these grounds are without merit.

(1) *The application to compel arbitration is not premature.*

Petitioner's written grievance was filed with (49) respondent on May 31, 1956 (Ex. 1 of respondent's affidavit).

This was an "Association-Employer Grievance", which is governed by the procedure set forth in Art. 20, par. B of our contract (p. 35 of Ex. A annexed to complaint).

This procedure calls for the parties meeting after the grievance is filed. Within two weeks after this meeting, the Employer is to serve its written answer upon the Association. If the latter finds the answer unacceptable, it is to serve its arbitration demand within two weeks after receiving the Employer's answer.

On May 31, 1956, the written grievance was filed.

On June 5, 1956, the parties had their meeting at which they took up this grievance.

Reply Affidavit of Charles N. Hall

On June 28, 1956, the Employer served its answer on the Association (Ex. 2 of respondent's affidavit).

On August 21, 1956, the Association filed its written demand for arbitration after finding the Employer's answer unacceptable (Ex. C annexed to complaint).

The grievance procedure dictated by our contract was followed completely, with the exception that both the Employer and the Association exceeded the time limits which the contract provides. The annexed affidavit of John Campbell (Chairman of the Association Grievance Committee) will more fully explain how both parties exceeded the time limits as the result of mutual oral arrangement.

Although the grievance procedure was fully exhausted, respondent contends that this action is nonetheless premature because of the following argument: Respondent claims the parties had an understanding that, if the Association rejected the Employer's written answer of June 28, 1956, (50) the Employer would then have the opportunity to file a substitute answer. From this alleged understanding, respondent draws the conclusion that the demand for arbitration was premature (and likewise this action) because it preceded the substitute answer (pp. 4-5 of respondent's affidavit).

There was an understanding between respondent's representatives (Messrs. Clark and Oestreicher) and petitioner's Grievance Committee. It occurred on June 15, 1956 when respondent called us to meet with it to discuss a proposed settlement of our grievance. The proposed settlement is repeated in respondent's answer of June 28, 1956 (Ex. 2 of respondent's affidavit). Respondent's representatives, through Mr. Clark, told us that if the Association rejected the answer, respondent would withdraw it. This was proposed in order that respondent would not later be bound by the terms of its proposed settlement.

Nothing was said by either side about a substitute answer.

The only way, under the contract, for the Association to reject respondent's answer of June 28, 1956 was by a demand for arbitration. Thus, our agreement (p. 35) states:

> "In the event that the Association does not accept the Employer's answer, it shall, within two weeks after the receipt thereof, *notify the Employer of its intention to submit the same to arbitration.*"

This was exactly what petitioner did. (As I noted above, the extension of time for both respondent and petitioner to answer each other was agreed upon by Mr. Clark for respondent and Mr. Campbell for petitioner).

Now, respondent claims that after it has mailed (51) a substitute answer (accomplished on October 1, 1956 after suit herein was begun), petitioner must demand arbitration all over again before beginning this action. This is a useless gesture.

In the first place, if we demanded arbitration after the proposed settlement answer, how much more applicable is the arbitration demand to respondent's complete rejection of our grievance.

In the second place, the respondent is aware of our demand for arbitration, served in accordance with the contract, and cannot prolong or avoid arbitration by placing a condition upon everyone of its answers, namely, that if rejected, it will serve a new answer. Under such conditions, petitioner's demand for arbitration would be wiped out by respondent handing us a new answer requiring a new arbitration demand ad infinitum.

Thirdly, respondent refused to arbitrate after receiving our arbitration demand, without saying or intimating that the demand must be repeated after respondent chooses to

submit a substitute answer. On two occasions, Mr. Clark told me on the telephone that he "owed" me another answer. I told him we already had his answer. No other answer came until after suit was begun.

On August 24, 1956 (3 days after our arbitration demand), respondent and petitioner had a meeting. Messrs. Oestreicher and Clark represented respondent. Mr. Campbell and I represented petitioner. At this meeting, Mr. Oestreicher informed us that respondent would go to court before it would arbitrate.

Again, on September 4, 1956, at another meeting, (52) where the same persons were present, Mr. Oestreicher told us to go back to our Representatives Council and have that Council reverse its rejection of respondent's proposed settlement contained in its answer of June 28, 1956. I said it could not be done. Mr. Oestreicher then said he doubted very much if our dispute would ever go to arbitration. When I asked him why, he again said that respondent would go to court before it would arbitrate.

We took that as a refusal to arbitrate.

Despite the fact that petitioner has asked respondent to join with petitioner to choose an arbitrator (Ex. D annexed to complaint), respondent has neglected to do so.

Furthermore, respondent's affidavit contains no desire to arbitrate, nor does it deny having refused to arbitrate. Its affidavit sets forth reasons why it should not be compelled to arbitrate on the claim that the dispute is not arbitrable.

John Campbell's affidavit, annexed hereto, recites the foregoing refusals of respondent to arbitrate.

In view of the foregoing, it is clear that the grievance procedure was exhausted, that petitioner, after receiving respondent's answer, served respondent with a demand for arbitration on August 21, 1956 and that respondent refused to arbitrate. The mailing of a belated, substitute answer

(after suit was already begun) cannot serve to make this action premature.

(2) *The dispute between the parties is arbitrable.*

I have read respondent's 22 page affidavit, in which the claim is made that the dispute herein involved should not be permitted to go to arbitration.

(53) It is clear, from the verified complaint and exhibits, that the dispute comes squarely within the arbitration clause in the contract.

Our arbitration clause provides for arbitrating disputes "arising out of the interpretation and application of the provisions of this agreement".

Respondent promised increases to a group of engineers if they would consent to move to a new job location. Those who agreed to go got the increases. Those who did not consent to go did not get the increases. (Ex. C annexed to complaint; Ex. 1 of respondent's affidavit).

Our contract expressly provides that respondent may increase minimum salaries "on a merit basis only" (Art. 18, par. H.). Our agreement also calls for respondent giving "merit" increases equal to 4.5% of the merit payroll (Ex. B annexed to complaint).

We claim that the disputed increases do not constitute increases "on a merit basis only". They are increases based on considerations other than merit. Since the contract specifically provides for respondent having the right to increase minimum salaries "on a merit basis only", respondent violated Art. 18, pars. H and J by unilaterally giving increases on a basis other than merit and charging them against the merit payroll.

The crux of the dispute is the interpretation and application of the phrase "on a merit basis only", as it appears in Art. 18, Par. H of our agreement.

Reply Affidavit of Charles N. Hall

Thus, we have a dispute "arising out of interpretation and application of provisions of this agreement."

Our arbitration clause expressly makes such (54) a dispute arbitrable. Therefore, respondent should be compelled to arbitrate the dispute in accordance with the terms of our arbitration clause.

But respondent says, in its affidavit, that it should not be compelled to arbitrate because:

(a) for many years petitioner did not like respondent's merit increase policy;

(b) the history of collective bargaining shows that petitioner endeavored without success to change the merit increase policy and to change the arbitration clause;

(c) petitioner, three years ago, had sought to arbitrate a disputed "merit" increase in a wholly different set of circumstances and the New York Supreme Court stayed the arbitration at respondent's behest;

(d) the increases in question were not granted because the recipients consented to move to a new job location, but were based largely upon additional responsibilities these recipients would be expected to shoulder at the new location; therefore, the increases were "on a merit basis only".

Respondent claims that by reason of the foregoing the dispute sought by petitioner to be arbitrated is not bona fide and should, therefore, not be permitted to be resolved by an arbitrator. Instead, it should be resolved solely and entirely by respondent's fiat.

I respectfully submit that, even if respondent were wholly correct as to the matters raised in its affidavit, such matters are for the arbitrator to weigh, sift and determine when he resolves the dispute under the (55) terms of our agreement.

Reply Affidavit of Charles N. Hall

It is true that petitioner did not and still does not approve of the merit increase policy of respondent. That does not result in the instant, disputed increases automatically and properly coming within the meaning of "merit". It is still for an arbitrator, under our agreement, to determine whether the disputed increases were "on a merit basis only" or on the basis of other and different considerations.

Nor does the history of collective bargaining detract from the arbitrability of the dispute herein. It is to be noted that even respondent's account of this history (much of which is to be disputed) does not make the claim that increases given to employees for agreeing to move to a new job location ever were discussed or ever were put in the category of "merit increases".

The truth is that the subjects of whether increases for consenting to move to a new job location or increases for added responsibilities (without promotion) were never a part of collective bargaining and were never discussed or adverted to in negotiations. Therefore, whether increases for such purposes come within the meaning of the phrase "on a merit basis only" raises a bona fide dispute as to the interpretation of that phrase which, under our agreement, is to be resolved by an arbitrator rather than by either of the parties on a unilateral basis.

Three years ago, petitioner was stayed by the New York Supreme Court from arbitrating whether an alleged general increase was a "merit increase". Then, petitioner sought to have an arbitrator order respondent to give equal increases to those who had not received any. Mr. (56) Justice Aurelio, as respondent noted, stayed the arbitration. But, in doing so, he said (see 127 N. Y. S. (2d) 61):

> "It is true that in appropriate circumstances an arbitrable dispute may exist upon a claim that in

creases were granted or withheld upon grounds and causes other than merit in violation of the spirit and purpose of the agreement."

The present dispute falls squarely within the above statement.

Petitioner's case three years ago which involved wholly different facts and circumstances, may have been non-arbitrable under the applied law of the State of New York. That does not mean that every subsequent dispute, involving new and different facts, may not be arbitrated.

Respondent's claim that the increases were really granted because the recipients are to have added responsibilities at the new location is a disputed fact and is for the arbitrator to resolve.

In the first place, Mr. Campbell (our Grievance Committee Chairman), Mr. Owen Thompson (our Department Representative) and I interviewed the engineers involved and took statements. The results of our interviews were that (a) respondent offered these engineers increases if they would consent to move; (b) those who consented got the increases; (c) those who refused did not get the increases.

In the second place, many of the engineers who consented to move to the new job location have received the increases now although the new job location is not yet ready to receive them. Therefore, it is a question of fact as to whether new responsibilities at the new job location are the true reason for increases given now.

In the third place, even if respondent's version (57) is correct (which we dispute), there still remains the interpretation of the phrase "on a merit basis only". "Merit" connotes reward for services already performed rather than added responsibility to be assumed (they may be poorly performed). Therefore, even if (as respondent

claims) the increases were for new responsibilities to be assumed, there is still a dispute as to whether such increases are "on a merit basis only".

Finally, respondent contends (pp. 20-22 of its affidavit) that although petitioner's grievance is patently to resolve a dispute as to the interpretation and application of Art. 18, pars. H and J of the agreement, its hidden purpose is to raise a dispute on behalf of the engineers who received no increase. Neither the grievance (Ex. 1 of respondent's affidavit) nor the demand for arbitration (Ex. C annexed to the complaint) bear out this ridiculous charge. The arbitrator can decide no more than what is submitted to him and nowhere has there been submitted to arbitration any claim that merit increases have been wrongfully withheld.

Respondent's affidavit raises facts which may perhaps aid it in winning the arbitration. But they do not bear upon the issue raised by petitioner's complaint, and that is whether the dispute comes within the scope of our arbitration clause.

Petitioner's verified complaint and the exhibits show:

(a) the existence of a written agreement to arbitrate;

(b) a dispute which comes within the scope of the agreement to arbitrate;

(c) respondent's refusal to arbitrate.

(58) I am informed by counsel, and verily believe, that all other questions of law or fact are for the arbitrator to determine.

Reply Affidavit of John Campbell

(59)

JOHN CAMPBELL, being duly sworn, deposes and says:

I am vice-president of Engineers Association, petitioner herein. I was Chairman of the Grievance Committee when the dispute herein involved was processed through the grievance procedure. I am completely familiar with every step through which this grievance passed.

My affidavit is in reply to that portion of Robert M. Clark's affidavit (on behalf of respondent) which asserts that this application to compel arbitration is premature because the grievance procedure was not exhausted. An examination of Mr. Clark's affidavit results in the conclusion that he expected the grievance procedure to be exhausted twice before petitioner would bring this action.

The following are the steps through which this grievance went:

1. On May 31, 1956, I personally served the written grievance herein involved on Mr. Robert M. Clark, (60) respondent's Employee Relations Supervisor, in his office (Ex. 1 attached to respondent's affidavit). This was an "Association-Employer Grievance", to which Art. 20, par. B of our contract applies.

2. The next step is for the parties to have a meeting to discuss the grievance. Such a meeting was held on June 5, 1956 in the office of Mr. Robert M. Clark. I was present. All facets of the grievance were discussed by both parties. Mr. Oestreicher, respondent's Employee Relations Manager told petitioner's Grievance Committee that respondent would study the situation, get further facts, and would give us its answer.

3. The next step, under our contract, is for the respondent to give the petitioner its answer to the grievance. On June 13, 1956, I met with Mr. Clark in his office on another and unrelated grievance. Mr. Clark asked me if it would be

alright if the respondent took more than the contract provision of two weeks to answer the grievance which is involved in this proceeding. I consented. I may, at this juncture, point out that it is customary for petitioner and respondent to accord each other time extensions with respect to the various steps in the grievance procedure.

4. On June 15, 1956, respondent asked the Grievance Committee to meet with respondent once more to discuss a proposed settlement of our grievance. We met at 2 P.M. in Mr. Clark's office. At this meeting, respondent, through Mr. Oestreicher, informed us that respondent disputed our facts. Then, Mr. Clark said that, to settle the grievance, respondent would not charge the increases against the merit payroll, although respondent would not concede the increases were not merit increases. I told respondent's representatives (61) that this proposed settlement did not answer the question of whether the increases were or were not "on a merit basis only". If they were not, respondent could not grant them unilaterally but could grant them only after negotiations with petitioner. Mr. Clark said that respondent would not negotiate such increases with petitioner. Mr. Oestreicher told us if petitioner rejected respondent's proposed settlement, respondent did not want such proposal to be used against respondent in the future. Therefore, it would withdraw its answer in the event petitioner rejected it. Nothing was said about a substitute or new answer.

5. On June 27, 1956, petitioner's Grievance Committee (with Charles Hall present) met again with Messrs. Clark and Oestreicher. This meeting was to clarify the contents of respondent's proposed settlement.

6. On June 28, 1956, respondent's answer (Ex. 2 attached to respondent's affidavit) was received by petitioner.

It contained the proposed settlement. As I noted above, this answer did not come within two weeks of our June 5th meeting because Mr. Clark and I arranged for waiving the time limit.

7. The next step required by our contract (if petitioner rejects the answer) is for petitioner to "notify the Employer of its intention to submit the same to arbitration", within two weeks after receiving the Employer's answer.

8. On August 21, 1956, petitioner served its notice of Intention to submit the dispute to arbitration (Ex. C annexed to complaint). This notice came about in the following way:

The Grievance Committee favored respondent's proposed settlement, as did our Executive Committee. However, (62) under our constitution, matters of this sort are decided ultimately by our Representatives Council.

A Representatives Council meeting was called for July 11, 1956. No quorum was present because vacation period was imminent.

I was instructed by our president, Charles Hall, to ask Mr. Clark for an extension of time for petitioner to accept the settlement proposal or reject it by notice of arbitration.

I spoke to Mr. Clark on July 12, 1956 on the telephone. I told him that the Representatives Council would not be able to meet again until after the plant reopened upon completion of the vacation period (July 15th to August 1st).

I told Mr. Clark that we could file our notice for arbitration today (i. e. July 12th) to keep within our time limits, but that we would prefer to wait for a decision from o Representatives Council.

Mr. Clark consented to extend our time until August 21, 1956.

Reply Affidavit of John Campbell

On August 20, 1956 the Representatives Council voted to reject respondent's proposed settlement.

Accordingly, on August 21, 1956 I filed with respondent the notice demanding arbitration, as provided for in our contract (Ex. C annexed to complaint).

By the foregoing steps, the procedure provided for by our agreement was exhausted, namely, (a) filing of written grievance, (b) joint meeting, (c) Employer's written answer, (d) demand for arbitration.

We understood that respondent's answer of June 28, 1956 would be withdrawn. That, to us, meant nothing more than that respondent would not be held, at any future (63) time, to the terms of the settlement proposal and that our grievance was rejected.

It did not mean that the entire grievance procedure would have to be repeated all over again.

After we served our arbitration demand upon respondent on August 21, 1956, we met informally with Messrs. Oestreicher and Clark on August 24, 1956. At that meeting Mr. Oestreicher told Mr. Hall and me that respondent would not arbitrate but would, instead, go to court to prevent arbitration.

He repeated the same statement at a meeting with our Grievance Committee on September 4, 1956 in the presence of Mr. Hall and myself.

At these subsequent meetings, neither Mr. Oestreicher nor Mr. Clark, nor any other representative of respondent told us that respondent was going to file a new answer to which we would have to file a new arbitration demand. On the contrary, respondent's representatives addressed themselves to the arbitration demand we had already served and said respondent would not arbitrate.

I wrote to respondent on August 23, 1956 for the purpose of selecting an arbitrator (Ex. D annexed to complaint). Respondent has ignored this letter.

Reply Affidavit of John Campbell

Subsequent to our demand for arbitration, respondent asked us to list the employees involved (although this information is more accessible to respondent than to us) and to tell respondent the relief we desired (although the only relief an arbitrator can give is to interpret the agreement.) In giving this information to respondent, we accused respondent of delaying to avoid arbitration (Ex. 6 attached to respondent's affidavit).

Since all the requirements of our grievance (64) procedure have been met, it would be a completely useless gesture for petitioner to serve a repeated arbitration demand upon respondent.

I respectfully submit to this Court that respondent is aware of petitioner's desire to arbitrate, that respondent received a written demand to arbitrate, that respondent has refused to arbitrate and that no useful purpose would be accomplished by having petitioner demand arbitration all over again.

Rebuttal Affidavit of Robert M. Clark

(65) ROBERT M. CLARK, being duly sworn, says:

The affidavits of Charles Hall and John Campbell, both sworn to on October 15, 1956, are disingenuous in their efforts to show compliance with the requirements of the grievance procedure.

Both acknowledge that on June 15, 1956, the EA and Sperry agreed to settle grievance number 42-56 subject to ratification. That settlement was predicated upon two considerations (1) since the guaranteed minimum for merit increases would more than be met even excluding the increases in question, Sperry agreed to exclude them in computing the guarantee, and (2) since the grievance arose from a one-time occurrence flowing from non-completion of the Salt Lake City plant, the instant situation had no future consequences. The settlement had no relation to the substance of the grievance and did not call upon either party to retreat from its avowed position. At no time prior to the rejection of the settlement did the parties discuss the substance of the grievance other than a formal, verbal denial by Sperry of the EA charge.

(66) The answer to the grievance filed by Sperry was not the usual type of answer stating Sperry's position on the substance of the grievance. It consisted only of a notation for the record of the settlement which had been verbally agreed upon beforehand (Exhibi "2" to my answering affidavit).

Mr. Hall's argument at page 3 of his affidavit that the only way to reject an answer is to demand arbitration has application only to the normal type of answer giving Sperry's position on the substance of the issue and applies only to arbitrable grievances.

Here, the EA reserved the right to reject the settlement. All that it had to do was to notify Sperry that it exercised the reserved right.

Rebuttal Affidavit of Robert M. Clark

Messrs. Hall and Campbell misstate the facts when they assert that Sperry wanted only the right to withdraw the first answer to avoid being bound by it in the future. The answer recited only a settlement without prejudice; if the EA rejected it, Sperry could not possibly be bound by it.

What Sperry insisted upon when the settlement was agreed to was an opportunity to reach the substance of the grievance if the EA rejected the settlement. What occurred subsequently demonstrates that this was the agreement of the parties:

1. A formal grievance session was held on September 4, 1956 to discuss the substance of grievance number 42-56 (the one here involved).

2. The EA agreed to furnish the names of the persons involved in the grievance—mute testimony to the fact that the parties had not theretofore reached the substance of the matter.

(67) 3. The EA agreed to state in writing the relief it sought—again demonstrating that up to this point the parties had never discussed the substance of the grievance. When the EA submitted this information, it labeled it "Addendum II to Grievance #42-56" (Exhibit "4" to my answering affidavit). If, as the EA now asserts, the grievance had been fully processed during June 1956, how can it explain this addition to the grievance which for the first time made a request for relief?

An example of the distortion by the EA of the facts appears on pages 5-6 of Mr. Campbell's affidavit. He asserts that in responding to Sperry's request for a statement in writing of the relief sought, the EA accused Sperry of delay to avoid arbitration. The statement is false in the following respects:

1. At the grievance session of September 4, 1956, the EA stated the relief it sought. What Sperry requested

was that it confirm its position in writing. That writing (Exhibit "4" to my answering affidavit) makes no charge such as Mr. Campbell recites.

2. The charge made by Mr. Campbell appears only in the second letter written by the EA (Exhibit "6" to my answering affidavit) in response to a request to clarify the first letter. Moreover, while the charge was made, the EA's second letter contains its own proof of its falsity with respect to that charge, for that second letter proceeds to respond to the Company's inquiry by adding to the relief demanded in its first letter—and it does so on the very point as to which Sperry had sought clarification. If Sperry's request had been unjustified, there would have been no need to make the amendment.

(68) It has also been suggested that Sperry rushed in with its answer after this proceeding had commenced. While the petition herein was verified on September 27, 1956, it was not served until October 1, 1956 and was served in Manhattan. Sperry's answer, by coincidence, was finally drafted on September 27, 1956 and was approved for delivery on October 1, 1956 and was dispatched at Great Neck prior to the receipt of information of the service of the petition.

Mr. Hall further asserts that Sperry takes the position that whenever its answer is rejected, it has the right to file a new answer. That is untrue. Sperry's position here is: it had the right to file a new answer, not because its prior answer was rejected, but because the *settlement* was rejected and because it had been agreed that, in this eventuality, the processing of the grievance with respect to its substance would then occur.

In sum, the facts clearly show that:

1. The parties never reached the substance of the grievance when they reached a settlement on June 15, 1956.

2. The parties agreed to return to the substance in the grievance procedure if the settlement were rejected.

3. In accordance with that agreement, a new grievance session was held on September 4, 1956.

4. Sperry filed its answer within the two week period allowed by the contract (i.e., two weeks from September 20, 1956 when the final clarification was received from the EA).

5. The EA demanded arbitration before the parties ever discussed the substance of the grievance and it filed its petition herein before it even knew, let alone considered, Sperry's position on the substance of the grievance.

With respect to the arbitrability of grievance number 42-56, Mr. Hail makes two assertions:

(69) 1. If the EA claims that an increase is not a merit increase, it has the right to arbitrate that claim.

2. Even if it is demonstrated that the Company did only what it had a right to do under the contract, the EA has a right to have an arbitrator so declare rather than the court.

Both of these issues were raised in litigation three years ago and resolved against the EA. And since then, the parties have twice bargained about these very issues and in the final bargain, they rejected the EA position and adopted the Sperry position. Now the EA asks this Court to rewrite the agreement of the parties to reach an interpretation directly opposed to that agreed upon by the parties.

Rebuttal Affidavit of Robert M. Clark

At great length in my answering affidavit I have set forth the history of negotiations over the last five years. While the EA makes the conclusory statement that it disputes "much" of that history, it fails to state a single matter in respect of which my statements were inaccurate. Indeed, it cannot, for almost every one was taken from its own publications.

The attitude which the EA here expresses is typical of its position on arbitrability. It asserts the right to make a claim without anything to support it and then makes the bootstrap argument that, because it made the claim, it has a right to arbitrate it.

This is precisely the position which the Company rejected three years ago. And, during the subsequent two negotiations, the parties bargained about these very issues and determined that the EA should be able to arbitrate only those matters which, if challenged, should be found by a court to constitute a bona fide dispute, (70) as that term is used in the New York law on the subject of arbitrability.

Mr. Hall asserts that:

> "even if respondent were wholly correct as to matters raised in its affidavit, such matters are for the arbitrators to weigh . . ."

Yet, this was the very position that the parties, after much discussion, deliberately decided to reject. To restate the matter in Mr. Hall's own words, the Company's position, which prevailed, was that:

> "First, the union must convince the Court that it has a bona fide dispute before the Court can decide that the stay of arbitration should be granted. The judge, in making such a decision, is saying, in effect, 'The union only thought it had a dispute. In read-

> ing the contract I can see that the company has done just what it contracted to do. Therefore, since I think that the contract has not been violated the union is wrong in thinking that it had a dispute.' . . . Of course the company justifies itself by saying, 'Now we have been protected from the irresponsible decisions of an arbitrator on a dispute which the union has made out of whole cloth.' "

This is what the parties agreed to. Upon challenge by the Company, the court would determine whether the Company had a right under the contract to do what it did or whether a bona fide showing has been made that it did not. If the Court determines that the Company acted properly under the contract, the EA is not permitted to put on a propaganda show before an arbitrator with the added hope of getting him to change the agreement.

Mr. Hall argues that the proceeding before the New York Supreme Court three years ago involved a different issue. But it involved the merit increase clause and the arbitration clause. While the EA likes to quote the dictum of Mr. Justice Aurelio, in granting (71) a stay of arbitration, that there might be circumstances which raise an arbitrable issue, it fails to refer to the final holding by Mr. Justice Schreiber that:

> "the agreement provides that 'merit increases are at the sole discretion of the Employer.' That discretion is not reviewable."

What showing has the EA made here?

The EA says it has an arbitrable dispute because the contract provides for merit increases "on a merit basis only." It chooses to ignore the provisions of the contract which state that:

> "It is distinctly understood and agreed that such

> merit increases are at the sole discretion of the Employer . . ."

and

> "All rights, powers and authority possessed by the Employer prior to the signing of this Agreement shall be retained by the Employer, subject only to such limitations as are specifically provided in this Agreement."

The EA cannot label a merit increase as an increase for some other purpose and thereby raise an arbitrable dispute. This is what Mr. Justice Schreiber decided and that is what the parties agreed to continue in the two ensuing negotiations.

The EA asserts that the increases given to employees transferring to Sperry Utah were given because they agreed to move and therefore were not for merit.

However, the EA does not deny·

(1) that the employees who received the increases merited them;

(2) that 12 of the transferring employees received no increases whatsoever in connection with their transfers.

(72) No employee received an increase because he agreed to move; had the contrary been the case, all transferring employees would have received them. Those who received increases did so because of promotions or increased responsibilities.

The EA misstates Sperry's position to be that the increases to those receiving them "were based largely upon additional responsibilities . . ." That is not so. These increases were based *entirely* either on promotions or on increased responsibilities.

Rebuttal Affidavit of Robert M. Clark

The EA stresses the fact that all those receiving increases agreed to move. That is true, as it necessarily had to be since all of the new jobs were with Sperry Utah. Those who refused to take the new jobs carrying promotions or increased responsibilities obviously would not get the increases going with the promotion or increased responsibility. But this certainly does not make the increase one for moving rather than for the promotion or increased responsibility. That this is so, follows from the fact that a very substantial portion of those agreeing to move received no increase whatsoever because the jobs to which they were transferring involved no increase in responsibilities or promotion.

Mr. Hall does not deny that eight of the 16 employees named in the grievance received promotions and that a merit increase for a promotion was proper.

He now concentrates his fire on the remaining eight employees who received merit increases for added responsibilities. And he makes two claims: (1) whether these eight employees would bear increased responsibilities warranting the merit increases they received is arbitrable, (73) and (2) whether a merit increase can be given for increased responsibility (without promotion) is arbitrable. Sperry denies both contentions.

The EA has not denied that ever since 1950, when the contract required each employee in the bargaining unit to receive a copy of the policies governing merit reviews, these policies have provided for the granting of merit increases such that, after the merit review, employees:

> "will be receiving equitable compensation for the duties and responsibilities then assigned."

Not only has each employee known this, as is required by the contract, but no objection has ever been raised to it and the contract has twice been renewed since this policy was first announced.

Rebuttal Affidavit of Robert M. Clark

A copy of the policy statement currently being distributed is annexed hereto as Exhibit "1" and made part hereof. This policy statement was issued prior to the renewal of the current agreement and no objection to it was made. This policy statement expressly provides for:

> "Merit increases . . . to reflect a corresponding change in duties and responsibilities."

At this late date, it cannot be contended that merit increases for increased responsibilities are improper.

In addition, it should be noted that the grievance which the petitioner seeks to arbitrate does not raise the issue as to whether merit increases may be granted for increased responsibility not accompanied by a promotion. Accordingly, the EA cannot now demand arbitration as to an issue never grieved.

(74) The EA contends that merely by asserting that merit increases were not given for increased responsibility, it can create an arbitrable issue even though it does not deny that the employees merited the increases. This claim would negate entirely the clause in the contracts under which "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer. . . ." The EA cannot substitute its judgment for that of the supervisors.

The only argument which the EA has made has been that the increases were given for moving to the new location. This, I have shown to be false since more employees agreeing to move received no increase than did receive it for increased responsibility

Finally, the EA throws in the contention that an increase may not be granted for increased responsibility in advance of performance because the job may be poorly done. This contention is a non-sequitur. The increase is given for the responsibility just as a merit increase for a promotion

is given for the promotion. An employee promoted does not wait until someone approves his performance in the new job before getting the increase. Neither does the employee assigned increased responsibility particularly where something the Company has done (i.e., the non-completion of the new plant) holds up a demonstration by the employee of his performance in the new assignment.

Moreover, this claim is a sheer afterthought. It does not appear in the grievance which alleges only that the increases were granted for moving. Certainly, then, this contention furnishes no support for seeking to arbitrate the instant grievance.

(75) What the EA's entire argument comes down to is the assertion that it should be permitted to go before an arbitrator because it claims that a dispute exists, even though it can show no basis for its claim. However, the parties agreed that the EA should not be permitted to do this.

Mr. Hall brands as ridiculous my charge that the EA filed the instant grievance "to do something" for the employees who received no increase (and who under the contract could not even file a grievance). Yet, the EA does not deny the appearance in its own official publication of the quotation appearing on page 20 of my answering affidavit, nor does it offer any explanation of that quotation. The plain fact is that this grievance was filed for propaganda purposes to satisfy the complaints of those who received no merit increase and who insisted that the EA do something about it. The instant grievance is not a permissible means of handling that problem.

Exhibit "1"

(76)

SPERRY GYROSCOPE COMPANY
Division of Sperry Rand Corporation

March 15, 1956

To: Engineering Division Personnel

Subject: April and October Salaried Personnel Review for Class I and Class II Employees

Each March and September we distribute the policies and procedures for our semi-annual merit reviews. This is in accordance with the Company—E.A. Agreement, as well as to inform all salaried employees in the Engineering Division.

OBJECTIVES:

The objective of our semi-annual salaried personnel rate review is to make certain that employees are recognized and compensated in proportion to their contribution or merit. In engineering and scientific activities such as ours, the quality, performance and effectiveness of individuals vary widely in many ways. Therefore, recognition and pay must be determined in accordance with the individual's qualities and performance. The key to success in any enterprise, and therefore to our job security resides with those employees who make the most of their respective talents by putting extra effort into their jobs. We are vitally interested in making sure that proper recognition and pay are given to these employees.

TYPE OF MERIT SYSTEM USED:

The system used is one of relative evaluation and rating which we selected as the one best suited for our type of

technical business. All employees in the Engineering Division are consistently observed for their on-the-job performance. This is a continuous evaluation as evidenced by promotions and increases between the dates of semi-annual reviews, exclusive of the quarterly review increases.

ELIGIBILITY:

Quarterly Increases

Class II employees hired, reinstated, or reclassified on or before the 15th of the month preceding the review month, into an applicable Class II position are eligible for a quarterly increase if their present salary is below the standard salary for their classification.

No employee who has worked less than six weeks prior to the effective date of the review and during the applicable quarter will be eligible for a quarterly increase. Similarly, a quarterly increase may be withheld from any employee if, in the opinion of the supervisor, such employee has failed to perform his job satisfactorily. The supervisor may, by stating his reasons in a memorandum to his superior and to the Vice President for Industrial Relations, arrange to withhold the increase, and will notify the employee in writing that the increase is being withheld and state his reasons for this action.

This quarterly increase shall be $2.00 per week, or the difference between the employee's presnt salary and the standard salary for the classification, whichever is less.

Merit Increases

Class II employees whose salaries are at or above the standard salary and Class I employees are eligible for review provided they have been hired, reinstated, or reclassified on or before the 15th day of the month preceding the review month, in the position in which they are to be reviewed.

Exhibit "1"

MERIT REVIEW RECOMMENDATIONS:

Individual recommendations may be made for:

Merit increases or change to a higher classification to reflect a corresponding change in duties and responsibilities. The salary for the new position must, in such cases, be at least the minimum for the new position.

Changes in status can also be made:

a) From Class I to Class II payroll if the employee's duties have changed so that he can no longer be considered to be an "executive", "administrative", or "professional" employee as defined under the Fair Labor Standards Act.

b) From a Class I or a Class II position to an hourly paid job classification.

(77) Position titles must conform to titles shown in current salary schedules or applicable labor agreements. Recommended salaries must fall within established salary ranges as provided for in the latest approved schedules or in applicable labor agreements.

OPERATION OF MERIT REVIEW:

Engineering Supervisors evaluate all information pertaining to the on-the-job performance of employees under their supervision. This evaluation is based on personal observations, discussions with group leaders or with supervisors in other departments with which the employee is working and any other pertinent performance information. A personnel analysis guide may be used to assist in determining that all of the important relative factors have been considered. (Copies of these guides may be obtained from Engineering Personnel.) After the Assistant Section

Exhibit "1"

Heads or Section Heads have evaluated their employees, a meeting is held with their Department Head to evaluate the relative merit of employees in the department. No salary discussions tak place at this meeting. Another departmental meeting is held to review the relative evaluations and proposed rate changes of employees in that particular department. Details of work assignments are discussed and, for example, a list may be made showing the relative order of overall on-the-job performance and present pay for all employees in that department.

The next series of meetings are held between the Engineering Department Heads and their respective Engineering Directors to discuss and consolidate the recommendations. Another conference is then held between the Engineering Departments, the Chief Engineer and the Engineering Personnel Representative to discuss special problems that may have arisen, to compare each department's recommendations and to review individually the top people in each Engineering Director's department to assure equitable and proper salary increases among the major departments.

The final step comprises the formal meetings held in the first week of April and October by the Salary and Wage Department and attended by the Engineering Director and his Department Heads, one or more of the Engineering Division top Administrative Heads and the Engineering Personnel Representative. The individual personnel record of each employee is reviewed once more in connection with rate recommendations. In this way, any unusual situations once more come under scrutiny. This final discussion, accompanied by formal entry of the proposed new rate on the review sheets, completes the steps of the process. After completion of all rate information for the Company, the review is approved by the Vice President

and General Manager and the new rates become official. No statement or commitment regarding a salary increase should be made to an employee by his supervisor until this time. Engineering supervisors will then promptly inform each employee receiving a merit increase and/or a change in classification.

LIMITATIONS ON MERIT INCREASES:

It is official Company policy not to have a fixed percentage covering either the number of increases or the amount allowable.

EFFECTIVE DATES OF INCREASES AND/OR CLASSIFICATION CHANGES:

Class II or Class I to Class II	April 30, 1956
Class I or Class II to Class I	May 1, 1956
Class II or Class I to Class II	October 29, 1956
Class I or Class II to Class I	November 1, 1956

/s/ LISLE L. WHEELER
Lisle L. Wheeler
Chief Engineer

LLW:prp:am

Memorandum Decision of Edelstein, *D.J.*

(78)

EDELSTEIN, *D.J.*:

The petitioner, a labor union, seeks to compel the respondent employer to arbitrate a controversy under the terms of an arbitration clause contained in the collective bargaining agreement between the parties. The employer operates a plant in New York and, upon opening a plant in Utah, offered some of the New York employees transfers to Utah. It appears that some of the employees consenting to the transfer were given increases. The collective bargaining agreement, after setting forth salary rates, provides that they may be increased "on a merit basis only", and further recites that merit increases are at the (79) sole discretion of the employer. The employer maintains that the increases involved were merit increases, but the union contends that they were transfer bonuses, not subject to the unilateral action of the employer. The contract provides for the arbitration of "all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement • • •."

The jurisdiction of this court is invoked under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, and Sections 4 and 6 of the United States Arbitration Act, 9 U.S.C. §1 *et seq.* The respondent, conceding division of authority among Courts of Appeal, takes the position that the court lacks jurisdiction. However, in this Circuit, at least, it is established that Section 301, which authorizes the bringing of suit in a district court for the violation of a contract between an employer and a labor organization, without regard to the amount in controversy or the citizenship of the parties, created "a generally applicable and uniform federal substantive right" as well as "a remedy and a forum in which to

enforce it." *Shirley-Herman Co.* v. *International Rice Carriers,* (2 Cir.) 182 F. 2d 806, 809; *Signal-Stat Corporation* (80) v. *Local 475, etc.,* (2 Cir.) 235 F. 2d 298. A number of district courts, including the Southern District of New York, have held that Section 301 itself authorizes decrees of specific performance of arbitration agreements. *Textile Workers Union* v. *American Thread Co.,* 113 F. Supp. 137; *Wilson Bros.* v. *Textile Workers Union,* 132 F. Supp. 163; *Local 207, Elec., etc.* v. *Landers, Frary & Clark,* 119 F. Supp. 877; *Evening Star Newspaper Co.* v. *Columbia Typographical Union,* 124 F. Supp. 322; *Insurance Agents' International Union* v. *Prudential Ins. Co.,* 122 F. Supp. 869. But see *Local 205, etc.* v. *General Electric Company,* (1 Cir.) 233 F. 2d 85, 96. In any event, inasmuch as federal law is applicable under Section 301, for remedy as well as substance, the United States Arbitration Act may provide the remedy of specific performance.

But "the remedy of an original action for specific performance under §4 is available only as to an arbitration agreement contained in the types of contracts defined by §2 as qualified by §1." *Local 205, etc.* v. *General Electric Company, supra,* 233 F. 2d at page 97. Section 2 defines as valid and enforceable "a contract evidencing a (81) transaction involving commerce "to settle a dispute by arbitration. And Section 1 excludes application of the Act to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The collective bargaining agreement in this case is a "contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Act. *Signal-Stat Corporation* v. *Local 475, etc.* (2 Cir.) 235 F. 2d 298; *Local 205, etc.* v. *General Electric Company,* (1 Cir.) 233 F. 2d 85; and see *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 108, 200-201. And the Court of Appeals for

the Second Circuit has indicated, in *Signal-Stat Corporation* v. *Local 475, supra*, its agreement with the Third Circuit's decision and reasoning in *Tenny Engineering, Inc.* v. *United Electric, Radio & Machine Workers*, 207 F. 2d 450, that "even assuming a collective bargaining agreement is a 'contract of employment'—the exclusionary clause in Section 1 applies only to 'workers engaged in • • • interstate commerce', *i.e.*, only those actually in the transportation industries." 235 F. 2d at page 302. The workers involved in this case are not in a transportation industry. Accordingly, the United States Arbitration Act is properly applicable.

(82) Nor is jurisdiction to compel arbitration withdrawn by the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* The case of *Alcoa S.S. Co.* v. *McMahon*, (2 Cir.) 173 F. 2d 567, cert. den. 338 U. S. 821, is inapposite. There it was held that the Norris-LaGuardia Act precluded the issuance of an order compelling a union to carry out the contract of employment, in compliance with a declaratory judgment interpreting the collective labor agreement. The situation in that case giving rise to a demand for an injunction is precisely the type of situation at which the Norris-LaGuardia Act was aimed; an order upon the union would have been classic labor injunction, "typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute." *Local 205, etc.* v. *General Electric Company, supra*, 233 F. 2d at page 91. "The general structure, detailed provisions, declared purposes, and legislative history of that statute show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co., supra*, 113 F. Supp. at page 142. On the contrary, a policy of the Norris-LaGuardia Act (83) to foster arbitration of

disputes between employers and unions is effectuated by a decree of specific performance of a voluntary arbitration agreement. *Wilson Brothers* v. *Textile Workers Union, supra,* 132 F. Supp. at pages 165-166.

Under Section 4 of the Arbitration Act, the court in an action to compel arbitration considers no issues (except for equity considerations) other than (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement. There is no dispute over the making of the agreement to arbitrate. But the employer denies his liability to arbitrate under that agreement because (1) the demand for arbitration is premature and (2) there is no arbitrable issue.

Under the collective labor agreement, a grievance may not come to arbitration until the specified grievance procedure has been carried out. That procedure entails (for an "Association-Employer Grievance" as here involved) a grievance session between the union's grievance committee and the employer's representatives in operations and industrial relations. After that session, the employer has two weeks in which to notify the (84) union of its decision in writing. In the event that the union does not accept that answer it must, if it desires to arbitrate, notify the employer within two weeks of its intention to submit the issue for arbitration. The union filed a written grievance with the company and the parties met to take up the grievance. But it is alleged that, because only a small number of persons were involved and the situation appeared to be a non-recurring one, the grievance committee and the employer's representatives agreed to settle the issue without going into the substance or merits of the grievance. An "Answer to Grievance No. 42-56" was served on the union, embodying the settlement, but the settlement by the grievance committee was subject to

further approval by the union. The union ultimately declined to ratify the settlement, and made a demand for arbitration.

This procedure would seem to be in conformity with the prescribed procedure preliminary to arbitration. However, the employer maintains that there had been an agreement that, should the settlement be rejected, the company had the right to file a new answer directed to the merits, which (85) would be processed through the grievance procedure. The parties did meet on the grievance subsequently, at which time the union agreed to furnish the names of the persons involved and agreed to state in writing the relief it sought. The list of names was submitted, and separately, marked "Addendum II to Grievance #42-56", a statement was furnished setting forth the relief sought. There were subsequently a letter from the company to the union seeking clarification of the relief sought and a union reply to that letter. On October 1, 1956 the company filed another "Answer to Grievance No. 42-56". But the petition in this case was verified four days before that answer was filed with the union and was received at the company corporate officers on the same day that the company's answer was filed at the plant. Consequently, it is argued, at the time this proceeding commenced, the grievance procedure had not yet been completed. Moreover, the employer argues that its right was not merely the formal one of filing an answer, but of having it considered in good faith by the union, which it could not have done, in the circumstances.

The employer's position is essentially that the first "Answer to Grievance No. 42-56" was in fact no answer, by agreement between the parties (86) permitting the employer to substitute a new answer on the merits in the event of union rejection of the settlement. But such an agreement is denied under oath. The fact that the parties

did meet subsequently and discuss the merits does not establish that there was an agreement to waive or extend the contract procedure. It is set forth, without contradiction, that at subsequent meetings the employer's representatives addressed themselves to the arbitration demand already served and declared their unwillingness to arbitrate, without reference to a new answer or a new arbitration demand. Moreover, in the letter responding to the company's request for clarification of the relief demanded, the union asked that the company proceed without delay in the selection of an arbitrator. Such a request is inconsistent with the existence of the agreement alleged. In any event, I cannot, on the facts presented in the affidavits, make a finding that there was such an agreement. It is, of course, the ideal function of the grievance procedure in a collective labor agreement to explore the merits of grievances with a view to amicable disposition on the basis of mutually understood facts. But it is hardly alien to the function of a grievance procedure to settle disputes (87) in some other way, as was attempted here. The fact that the substance of the grievance was not aired is no doubt unfortunate, but the grievance machinery of the contract is one of procedure; if the procedure is exhausted, the company may not be heard to complain that the procedure did not embrace the merits of the complaint. Otherwise, a step would be added to the grievance procedure not specified in the contract. Except for the time limitations which, it is alleged without contradiction, were extended by both sides, the contract procedure was followed and the demand for arbitration was not premature.

The employer's position on the arbitrability of the dispute is that on the basis of prior negotiations and litigation between the parties, it is established that they contracted in view of New York law that only bona fide disputes would be arbitrable. *General Electric Co. v. United*

Electrical Radio & Machine Workers of America, C.I.O., 300 N. Y. 262; *Taft* v. *Sperry Gyroscope Co.*, 127 N. Y. S. 2d 61. The dispute, it is alleged, actually involves the union's desire to arbitrate a grievance that merit increases had been improperly withheld from certain employees. But inasmuch as that claim is not arbitrable, (88) or even properly the subject of a grievance, under the clause in the contract giving to the company sole discretion in the matter of merit increases, the union instead filed a grievance about the granting of such increases to others (who were leaving the bargaining unit anyway), thereby (1) using the grievance for "propaganda" purposes pursuant to a long standing attempt to alter the sole discretion clause, and (2) hoping to apply pressure on the company in favor of those who had not received merit increases. Accordingly, the company has set forth facts in connection with the granting of the increases to the employees in question, and argues that it is the burden of the union to meet the challenge by persuading the court that there is a bona fide basis for the claim; if the court concludes that the agreement has not been violated there can be no arbitration.

In the General Electric case, supra, 200 N. Y. at page 264, the New York law is stated: "If, under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration. • • • Whether or not a bone fide dispute exists is a question of law • • •." (89) In that case, under the guise of a claim that the company was violating the anti-discrimination provision of the collective bargaining agreement by failure to afford pension credits for time spent in union activities beyond those hours for which the company had agreed to pay, the union sought arbitration. But the court found that the company was not obliged under the

contract to give pension credits for time spent in union activity beyond a maximum number of hours per week, for which the company had agreed to pay, and there was no arbitrable issue, even though the alleged dispute fell within the literal language of the arbitration agreement. And in *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d 61, involving the parties at bar in the instant case, the court found that although the issue for arbitration was ostensibly that the company granted merit increases for reasons other than merit, the real issue, on the basis of the relief demanded, was the arbitration of wage schedules, clearly beyond the arbitral machinery.

These cases are authority for nothing more than the proposition that arbitration may not be compelled on an issue not arbitrable under the contract, and arbitrability may not be conferred by (90) the mere device of a label. The contract between the parties provides that the employer may, at its sole discretion, grant increases "on a merit basis only". The union contests certain increases as not being on a merit basis only, but as being, at least in part, transfer bonuses. The employer insists, with supporting allegations of fact, that the increases were on a merit basis only and not subject to arbitration by being labeled with another name. But the determination of whether the label attached by the union is inaccurate involves, in this case, a determination of disputed fact, in anticipation of the arbitration itself, and a begging of the entire question. The determination of arbitrability, that is, whether there has been a violation of contract by the company, or a default of arbitration, must be one of law. It must be found that the issue raised is in reality outside the scope of the contract, as appears from a consideration of the true nature of the claim against the terms of the agreement. In prior litigation between the parties, it has been noted that "in appropriate circumstances an arbitra-

ble dispute may exist upon a claim that increases are granted or withheld upon grounds and causes other than merit in violation of the spirit and (91) purpose of the agreement." *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d at page 62. It would appear that the appropriate circumstances exist at this time. The issue sought to be arbitrated is whether the increases given were on a merit basis only and this issue is certainly, in the terms of the contract, a dispute "arising out of the interpretation or application of the provisions" of the agreement. There is a direct challenge that certain increases were not merit increases and the decision of the arbitrator will be that they were or were not, with no implication of extraneous or collateral issues involving the general wage schedule, or the granting or withholding of increases or the amount of any increase. There is no basis as a matter of law for a determination that an extraneous issue is being subjected to arbitration by the application of a label. The union motive for seeking arbitration, if the issue is arbitrable, may not be tried in the judicial forum, no matter how significant it may be in the arena of labor-management relations.

Moreover, it would seem that the employer itself considered the issue to be arbitrable, inasmuch as it participated, apparently without (92) objection, in the processing of the dispute through the grievance machinery. Cf. *Signal-Stat Corporation* v. *Local 475, etc.,* (2 Cir.) 235 F. 2d 298. Indeed, in arguing the prematurity of the arbitration demand submitted before the merits of the grievance were explored, the employer insists that the grievance procedure was designed precisely to bring out the kind of facts available in this instance to avoid misunderstanding based upon preconceptions and lack of information. If the dispute is one referable to the grievance machinery, it is not one within the sole discretion of the employer. While not

all "grievable" disputes are arbitrable under the contract, this one is, for it involves a difference arising out of the interpretation or application of the provision in the contract authorizing the employer to make increases on a merit basis only.

Accordingly, the application to compel arbitration will be granted.

Dated: February 5th, 1957.

DAVID N. EDELSTEIN
United States District Judge

Judgment entered Feb. 5, 1957.

HERBERT A. CHARLSON
Clerk

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IN THE

Supreme Court of the United States

October Term, 1957

No. 831

SPERRY GYROSCOPE COMPANY, Division of Sperry Rand Corporation,

Petitioner,

—v.—

ENGINEERS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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598 Madison Avenue
New York 22, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

SPERRY GYROSCOPE COMPANY, Division of Sperry Rand Corporation,

Petitioner.

—v.—

ENGINEERS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 27, 1957.

Citations to Opinions Below

The opinion of the District Court appears below at p. 28 and is reported at 148 F. Supp. 521. The opinion of the Court of Appeals appears at p. 19 and is reported at 41 BNA, LRRM 2272.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1957 (R. 102). Rehearing was denied on January 22, 1958 (R. 118). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

This proceeding, to compel arbitration of an alleged grievance arising under a collective bargaining agreement, was commenced in the District Court for the Southern District of New York by the filing and service of a notice of motion (R. 2) and a petition (R. 3) under the United States Arbitration Act, 9 U. S. C. §§4, 6. The District Court held that it had jurisdiction under the Arbitration Act and ordered arbitration under that statute (R. 84). However, the Court of Appeals declined to hold that jurisdiction lay under the Arbitration Act but held that jurisdiction existed over a plenary action under Section 301(a) of the Labor Management Relations Act, 1947, 29 U. S. C. §185(a), and affirmed the judgment, although no summons had been filed or served, and no trial had been held.

Questions Presented

1. Where the jurisdiction of the District Court has been invoked, under 9 U. S. C. §§4, 6, by service of a notice of motion (without a summons) and of a petition, and the District Court has rendered judgment on the motion without a trial, may the Court of Appeals sustain jurisdiction of the District Court under 29 U. S. C. §185(a)?

2. Is service of a summons required to secure personal jurisdiction over a defendant in a suit commenced under 29 U. S. C. §185(a), and, if it is, was service of process

waived by filing an answering affidavit to a petition accompanying a notice of motion making an application under 9 U. S. C. §§4, 6 (which require no summons for personal jurisdiction) without objecting to the absence of the service of a summons?

3. If service of process was waived in an action under 29 U. S. C. §185(a), did appellant also thereby waive the right to file an answer, to pre-trial procedures and to a trial?

4. In an action under 29 U. S. C. §185(a), may summary judgment be granted compelling arbitration of a written grievance under a collective agreement where that agreement makes processing of the grievance through the contractual grievance machinery a prerequisite to arbitration and where proof, on personal knowledge, has been submitted (a) that upon a withdrawal of the written grievance, subject to ratification, it was orally agreed that, should ratification fail, the normal grievance processing would take place and (b) that the party demanding arbitration failed to comply with this agreement; and where the only proof to the contrary was an implied denial that such an oral agreement was made?

5. Does a District Court have jurisdiction to compel arbitration under 9 U. S. C. §4 where the alleged arbitration clause appears in a collective bargaining agreement?

6. May arbitration be compelled, under either 29 U. S. C. §185(a) or 9 U. S. C. §4, of an issue as to which no grievance has been filed and no demand for arbitration has been made, where the contract under which arbitration has been

directed requires that matters submitted to arbitration first be processed through a grievance machinery created by the contract?

7. May an employer be compelled, under either 29 U. S. C. §185(a) or 9 U. S. C. §4, to arbitrate whether certain wage increases, granted to employees for accepting increased responsibilities, are "on a merit basis only", where the contract provides that "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer" and the contract permits arbitration only upon a substantial showing in support of the alleged violation, and the policy statement governing merit increases (which policy statement was authorized by the contract) expressly authorizes merit increases for increased responsibilities?

8. Where the parties had previously litigated the meaning of the arbitration and merit increase clauses in a State court which held that the employer's discretion in granting merit increases was not reviewable and the contractual clauses were thereafter twice renewed without change, despite union requests that the clauses be changed, does the State court decision determine the interpretation of these clauses in a suit under 29 U. S. C. §185(a) or in a proceeding under 9 U. S. C. §4?

Statutes Involved

Federal Arbitration Act, 9 U. S. C. §§1, *et seq.*

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

* * * "'commerce,' as herein defined, means commerce among the several States or with foreign na-

tions, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

§4. Failure, etc., to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbi-

tration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Labor-Management Relations Act, 1947, 29 U. S. C. §§141, *et seq.*

§185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Statement

Petitioner (herein called "Sperry") has a plant in Great Neck, N. Y. in which respondent union (herein called "EA") has for many years represented a bargaining unit of employees. In 1956, Sperry was in process of opening a new plant in Salt Lake City, Utah, which would not be covered by the collective agreement with EA (R. 15). To staff that new plant it offered transfers to certain personnel at Great Neck (R. 15). Of 28 employees who accepted transfers, 12 were to receive the same positions previously held at the same rate of pay, 8 were to receive promotions in classifications with corresponding pay increases, and 8 were assigned greater responsibilities (within their existing classifications) with corresponding pay increases (R. 49-51).

The EA was fearful that the granting of increases to those transferring would as a practical matter reduce the merit increases available for those remaining. (See EA statement quoted at R. 36.) Under the contract the EA could not grieve or arbitrate the denial of a merit increase (R. 37, Ex. p. 29).* In order to apply pressure upon Sperry to grant merit increases to those remaining at Great Neck

* "Ex" refers to the collective agreement which was certified as a separate exhibit by the Clerk of the Court of Appeals.

and in the mistaken notion that everyone who transferred received an increase (R. 4-5), the EA filed a grievance on May 31, 1956, charging that the increases had been granted in violation of the contract because they were based entirely upon the "employee's consent to be transferred" (R. 41).* The only proof adduced in support of the grievance was the erroneous allegation that every employee transferred received an increase (R. 4-5).

The collective agreement provides that increases shall be "on a merit basis only" but it further provides that "It is distinctly understood and agreed that such merit increases are at the sole discretion of the Employer" (Ex. pp. 29-30). The agreement also provides for the continuance of Sperry's "present semi-annual merit review practice", and for the publication by Sperry of the policies governing the merit review (Ex. p. 29). These policy statements have for many years authorized merit increases "to reflect a corresponding change in duties or responsibilities" and no grievance or objection has ever been filed by the EA with respect thereto (R. 75-76).

The same merit increase and arbitration clauses in the present contract have appeared in a series of prior contracts (R. 35), and the parties have bargained concerning the interpretation and interrelation of these clauses. The EA recognized that it could not demand arbitration under the contract without adducing substantial proof in support

* EA also grieved that these increases should not be charged to the guaranteed amount of merit increases of 4.5% of payroll. At the time, this portion of the grievance was premature since it is not until the end of the year that one may determine the significance of any charge. Neither the District Court nor the Court of Appeals mentioned this issue. In fact, it is academic because, excluding these increases, the amount of merit increases exceeded the guarantee.

of its claim that a violation had occurred (R. 25). In 1953 it demanded arbitration with respect to a claim that certain wage increases which Sperry had designated as "merit increases" were not in fact "merit increases" and that Sperry had violated the contractual provision that only merit increases were to be granted. The arbitration demand was stayed in New York Supreme Court upon the ground (1) that the EA had adduced no proof showing the alleged violation and (2) that merit increases are at Sperry's sole discretion and "That discretion is not reviewable" (*Infra*, p. 39).

Upon the expiration of the agreement in force in 1953 and again at the expiration of the following agreement, the EA sought to have the merit increase and arbitration clauses changed (a) so that it would not be required, as a condition of its right to arbitrate, to adduce proof that an increase designated as a "merit increase" was not in fact for merit and (b) to eliminate Sperry's discretion with respect to merit increases (R. 26-35). These demands were rejected by Sperry and the new collective agreements were executed without change on these points. The instant contract, therefore, contains the same merit and arbitration clauses as did the 1950-1954 and 1954-1956 contracts. Each of these contracts has required that all issues submitted to arbitration be first processed through the grievance procedure of the contract. It does not follow, however, that all grievable matters are arbitrable since the grievance clause is much broader than the arbitration clause (Ex. pp. 34-35).

Before the EA's grievance was processed, Sperry pointed out that the situation there involved had occurred only because the Utah plant was not ready on time and that a

recurrence of this particular situation was unlikely. On this consideration—and without prejudice—the EA Grievance Committee agreed to drop the grievance, but subject to ratification by other EA organs. EA's Executive Committee approved but its Representatives Council rejected the withdrawal for reasons unrelated to the issues (R. 16-17).

Sperry submitted affidavits showing that the parties had agreed that, if ratification did not take place, the grievance would be processed through the normal grievance machinery (R. 17). It further pointed out that a grievance session was held thereafter and that the EA amplified the details of its grievance and its demand for relief (R. 17-18). Nevertheless, the EA commenced this proceeding in the District Court before the expiration of Sperry's time to answer under the grievance procedure rules (R. 18). The District Court rejected the evidence adduced by Sperry on its finding that the EA denied in its affidavit the existence of the agreement to conduct the regular grievance processing if ratification did not occur (R. 87-88). While the Court of Appeals concluded that in no event could arbitration be demanded before the grievance processing had taken place, it held that "On this issue the findings of the District Court rejecting Sperry's allegation are fully supported by the record" (R. 97).

On August 21, 1956, the EA demanded arbitration of its charge in the instant proceeding that increases had been granted "on the basis of such employees consenting to being transferred" (R. 12). It filed on September 27, 1956 (R. 1) and the Marshal served on October 1, 1956 (R. 18) a notice of motion which recited that it was made

"pursuant to Section 4 and 6 of the United States Arbitration Act, U. S. C. Title 9" for an order compelling arbitration (R. 2). An answering affidavit was served on October 11, 1956.

The District Court, after receiving the affidavits and hearing oral argument on the motion, as provided in Section 6 of the Arbitration Act, granted the order under the Arbitration Act (R. 84). It held that an arbitrable issue existed as to whether the increases were "transfer bonuses" (R. 90), the determining factor, in its view, being that the demand for arbitration did not call upon the arbitrator for relief precluded by the contract (R. 91). It further reasoned that Sperry had recognized the arbitrability of the issue by permitting the grievance to be processed, although it acknowledged that the scope of the grievance clause was broader than that of the arbitration clause (R. 91).

The Court of Appeals affirmed the judgment of the District Court but it directed arbitration of a different issue than the District Court had, and it did so on entirely different grounds. It relied upon 29 U. S. C. §185(a) to sustain jurisdiction and declined to decide whether the Arbitration Act could apply. It also held that Sperry had waived service of summons by not objecting to its absence in its answering affidavit to the petition under the Arbitration Act (R. 95-6). It further laid down the *general* rule (not argued for Sperry, although the Court so ascribes it) that a party seeking arbitration of an alleged breach of contract must adduce facts (as distinguished from charges) showing the alleged breach (R. 100). The Court did not refer, in its interpretation of the arbitration clause, to the prior negotiations and litigation on the basis of

which Sperry had urged that *under this contract*, a party was required to adduce facts (as distinguished from mere charges) showing the alleged breach. And it expressly rejected the District Court argument that an issue became arbitrable once it had been processed as a grievance (R. 97).

Examining the facts shown in the affidavits, the Court of Appeals held that Sperry properly granted the promotional increases to the 8 employees who had been promoted (R. 100). It further held that the remaining 8 increases were in fact granted for "positions of higher responsibility" (R. 100). It ruled, however, that whether increases granted for higher responsibility constitute "merit" increases is an arbitrable issue (R. 101).

Reasons for Granting the Writ

1. The questions presented are of importance in the administration of Section 301(a) of the Labor Management Relations Act, 1947, 29 U. S. C. §185(a), and of the United States Arbitration Act, 9 U. S. C. §§1, *et seq.*

In *Textile Workers Union* v. *Lincoln Mills of Alabama*, 1 L. ed. 2d 972 (June 3, 1957), decided after the instant proceeding had been commenced, this Court for the first time held that arbitration under a collective agreement may be compelled in a plenary action brought under 29 U. S. C. §185(a). In a companion case in which the Court of Appeals, in a plenary action, had ordered arbitration under the Arbitration Act, this Court declined to affirm under the Federal Arbitration Act but, instead, did so under 29 U. S. C. §185. *General Electric Co.* v. *Local 205*, 1 L. ed. 2d 1028. The dissenting opinion of Mr. Justice

Frankfurter noted that he found "rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion" (1 L. ed. 2d at 986). Prior to these two cases, Courts of Appeal in four Circuits had held the Arbitration Act inapplicable to collective agreements. *International Union* v. *Colonial Hardwood Floor Co.*, 4th Cir., 168 F. 2d 33; *Lincoln Mills* v. *Textile Workers Union*, 5th Cir., 230 F. 2d 81, rev'd oth. grds. 1 L. ed. 2d 972; *United Steelworkers of Amer.* v. *Galland Henning Mfg. Co.*, 7th Cir., 241 F. 2d 323, 326-328, rev'd oth. grds. 1 L. ed. 2d 1425; *Mercury Oil Refining Co.* v. *Oil Workers Int. Union*, 10th Cir., 187 F. 2d 980, 983. However, the Second Circuit had held to the contrary in *Signal Stat. Corp.* v. *Local 475*, 2d Cir., 235 F. 2d 298.

The Court below avoided deciding whether its decision in *Signal Stat., supra,* as to applicability of the Arbitration Act to collective agreements, had been overruled *sub silentio* by this Court in the *General Electric* case, *supra.* It did so by holding that Sperry had waived service of summons by filing an answering affidavit to the petition under the Arbitration Act, without protesting the lack of such service. The EA, however, plainly relying upon the authority of the Second Circuit's opinion in the *Signal Stat.* case, *supra,* drew its "Motion" and "Petition" under the Arbitration Act and the District Court issued its order on the same authority.

The notice of motion clearly stated that the application was made "pursuant to Sections 4 and 6 of the United States Arbitration Act, U. S. C. Title 9" (R. 2). The

reference to 29 U. S. C. §185 in the petition* was to satisfy the requirement of 9 U. S. C. §4 that the proceeding be brought in the District Court which would have had jurisdiction of the underlying dispute had there been no arbitration clause, and the EA so explained it in its brief before the District Court (R. 107) and we so understood it in ours (R. 108). There was no occasion to protest lack of personal jurisdiction for a suit under 29 U. S. C. §185(a) since the petition did not found jurisdiction upon 29 U. S. C. §185(a) alone, but upon that statute jointly with 9 U. S. C. §§4, 6, and, under the latter, no summons was required. While 9 U. S. C. §6 provides its own procedural rules and is excluded from the coverage of the Federal Rules of Civil Procedure (Rule 81(a)(3)), the Federal Rules of Civil Procedure do apply to 29 U. S. C. §185(a) so that service of a summons is required (Rules 1 and 4).

Moreover, beyond the matter of the process necessary to commence a plenary action under 29 U. S. C. §185(a), there is the further question of the procedure which must be followed in such a plenary action before a judgment is rendered. For by affirming the order of the District Court under the authority 29 U. S. C. §185(a), the Court of Appeals has here sustained the entry of a final judgment in a plenary action without a trial, and without any opportunity to bring to bear the pre-trial procedures authorized by the Federal Rules of Civil Procedure.

Assuming *arguendo*, as the Court of Appeals determined, that Sperry somehow waived the filing and service of a summons and complaint in a plenary suit under 29 U. S. C.

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* "Jurisdiction of this Court is based on Section 301 of the Labor Management Relations Act, 1947 U. S. C. Title 29, Section 185, and the United States Arbitration Act, U. S. C. Title 9" (R. 3).

§185(a), on what basis does the Court of Appeals proceed to award *judgment* as in a plenary suit? The EA's only motion was specifically designated as being exclusively under the Arbitration Act (R. 2). Sperry's answering and rebuttal affidavits in opposition to the petition and motion could hardly be deemed a waiver of Sperry's procedural rights to trial on the issues raised by the pleadings, and to pre-trial procedures applicable to the plenary action theory of the case.

The Court of Appeals certainly would not have been justified in granting judgment unless it could convert the motion under the Arbitration Act to one for summary judgment in a plenary action. There was, however, an issue of fact as to the agreement to return the grievance to normal grievance machinery processing (R. 17-18) which the District Court could not decide on affidavits. The Court of Appeals held that "the findings of the District Court rejecting Sperry's allegations are fully supported by the record" (R. 97). The District Court, however, purported to make its findings by weighing the conflicting statements in the affidavits. It stated (R. 87-88):

> "The employer's position is essentially that the first 'Answer to Grievance No. 42-56' was in fact no answer, by agreement between the parties permitting the employer to substitute a new answer on the merits in the event of union rejection of the settlement. But such an agreement is denied under oath. The fact that the parties did meet subsequently and discuss the merits does not establish that there was an agreement to waive or extend the contract procedure. . . . In any event, I cannot, on the facts presented in the affidavits, make a finding that there was such an agreement."

The affidavit, submitted by Sperry in the District Court, stated on the personal knowledge of the affiant that (R. 17):

> "The Company filed an answer reflecting this settlement (annexed hereto as Exhibit '2') on the understanding that, should the EA fail to ratify the settlement, the Company would then address itself to the content of the grievance under the grievance procedure."

And also that (R. 70):

> "it had been agreed that, in this eventuality [i.e., failure of ratification], the processing of the grievance with respect to its substance would then occur."

This evidence the District Court rejected on the basis of conflicting affidavits reporting a different version of oral statements. However, to grant summary judgment resolving conflicting testimony as to oral conversations which are not inherently improbable is in conflict with the decisions of the Courts of Appeal in other Circuits. Thus, it has been held that "A litigant has a right to a trial where there is the slightest doubt as to the facts." *Peckham* v. *Ronrico Corp.*, 1st Cir., 171 F. 2d 653, 657. "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue." *Whitaker* v. *Coleman*, 5th Cir., 115 F. 2d 305, 306. Also: *Walling* v. *Reid*, 8th Cir., 139 F. 2d 318, 322; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3rd Cir., 130 F. 2d 1016, 1018; *Dewey* v. *Clark*, D. C. Cir., 180 F. 2d 766, 772.

2. The only arbitrable issue found by the Court of Appeals was whether Sperry could grant a merit increase for higher responsibility (R. 100-101). However, the claim filed as a grievance (R. 41) and the issue as to which arbitration was demanded (R. 12) was only that Sperry had

violated the contract by granting increases "on the basis of such employees consenting to being transferred". Thus, the issue held to be arbitrable had not been processed in the grievance procedure as required by the contract (Ex. pp. 34-36) nor was it included in the demand for arbitration. Moreover, the class of increases held to be questionable by the Court is expressly authorized by the policy statement (R. 80, 75-76) required by the contract (Ex. pp. 29-30).

There are thus presented important questions as to the policy to be followed in compelling arbitration, under this Court's decision in *Textile Workers Union* v. *Lincoln Mills*, *supra*, where the contract makes grievance machinery processing a prerequisite to arbitration and that processing has not taken place. These questions have not previously been determined by this Court but ought to be since they are not only important but they arise under almost every collective bargaining agreement arbitration clause.

3. There is also presented another important question left open by *Textile Workers Union* v. *Lincoln Mills*, *supra*, namely the proper effect to be given to State court decisions interpreting the collective bargaining agreement involved in the proceeding in the federal court. Here, there not only was a prior State court decision interpreting the very clauses here involved but the parties specifically agreed not to change the clauses when the contracts were twice renegotiated thereafter (R. 25-36). The State court had held that Sperry's discretion in granting increases was not reviewable. *Infra*, p. 39. No weight was given to that determination in the Court below. Most arbitration clauses in collective agreements, particularly those now effective, have been written in the light of State law. The effect to be

given that law is an issue of general significance which ought to be speedily resolved to avoid confusion in the administration of 29 U. S. C. §185(a).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EMANUEL L. GORDON
Counsel for Petitioner

February 28, 1958.

APPENDIX A

Opinion of Court of Appeals Before Medina, Hincks and Waterman

WATERMAN, *Circuit Judge*:

Engineers Association (EA), a labor organization representing the non-supervisory professional engineers and technicians employed by Sperry Gyroscope Co. at the latter's plant in Great Neck, New York, proceeded in the District Court to compel Sperry to submit to arbitration in accordance with the terms of a collective bargaining agreement between the parties. The court, after a hearing, granted the relief requested and Sperry appeals. Reversal is sought on the grounds that (1) the District Court lacked jurisdiction, (2) the demand for arbitration was premature because of the failure of the union to exhaust the grievance procedure as required by the contract, and (3) under the terms of the contract the dispute is not arbitrable.

In March 1956, Sperry and EA entered into a collective bargaining agreement governing the terms and conditions of employment of the employees represented by the union. Several months later Sperry began construction of a new plant in Salt Lake City, Utah; and, in connection therewith, requested a number of its employees to transfer to a customer installation unit in Pasadena, California. It was understood that employees consenting to the transfer were to be assigned to the Utah plant when the construction of that plant was completed. There is no indication in the record as to how many employees Sperry approached about this program, but, in any event, twenty-eight employees consented to the transfer. Sixteen of these twenty-eight received an increase in salary. EA alleges that the salary

increases were granted to provide an incentive to transfer to the new plant. Consequently, it contends, the salary increases violated that provision of the collective bargaining agreement which specifies that "Salary increases for individual employees • • • shall be on a merit basis only." Sperry denies that the salary increases were granted for considerations other than merit; and, in addition, asserts that the granting by it of merit increases is not arbitrable under the contract. In support of this assertion it relies upon the recital in the contract that "merit increases are at the sole discretion of the Employer • • • "

EA invoked the jurisdiction of the District Court under "Section 301 of the Labor Management Relations Act, 1947, U. S. C. Title 29, Section 185 and the United States Arbitration Act, U. S. C. Title 9." We need not determine whether jurisdiction might be sustained under the latter act, cf. *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298 (2 Cir. 1956), cert. denied, 354 U. S. 911, since it is clear that Section 301 of the Labor Management Relations Act confers power upon the District Courts to compel arbitration in accordance with the terms of a collective bargaining agreement. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957).

Sperry urges, however, that the present proceeding was commenced by Petition and Notice of Motion, a procedure it claims is authorized only by the Federal Arbitration Act. Hence, it contends, the present proceeding was not a suit commenced under Section 301, and *Lincoln Mills* is, therefore, not dispositive of the jurisdictional issues presented on this appeal. We may assume, without so deciding, that Sperry is correct in its contention that proceedings under

Section 301 must be commenced by the filing of a complaint and the service of a summons. Nevertheless, the petition clearly invoked the jurisdiction of the District Court under Section 301. Sperry failed to object to the manner in which the proceeding had been commenced; and within twenty days following service upon it of the Petition and Notice of Motion filed its answer, denying that an arbitrable dispute existed and alleging that EA's demand for arbitration was premature. The answer did not state that there had been any impropriety in commencing the proceeding by petition. The failure to do so is a waiver by Sperry and it is precluded from asserting this contention at this time. See Rule 12(h), Fed. Rules Civ. Proc.

A clause of the collective bargaining agreement at issue here requires as a condition precedent to arbitration that the grievance procedure elsewhere provided for in the contract be exhausted prior to a demand for arbitration.[1] In compliance with this requirement EA filed a grievance[2]

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[1] Immediately following that portion of the contract setting forth the grievance procedure, the contract provides:

"F. Arbitration

"1. Unless otherwise provided elsewhere in this Agreement, all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement that shall not have been satisfactorily settled within two weeks following the procedure hereinabove set forth shall, at the request of either party, be promptly submitted to arbitration."

[2] A dispute such as the present one is termed by the contract an "Association-Employer Grievance." The procedure for dealing with such disputes is set forth in Article 20 of the contract which provides, in pertinent part:

"B. Association-Employer Grievances

"1. All disputes, differences or grievances that may arise between the Association and the Employer, or between the

with Sperry and therein stated its objections to the salary increases that are the basis of the present dispute. The employer denied the charges made by the union. During the next several months the parties discussed the subject matter of the grievance and exchanged correspondence. These negotiations failed to result in a settlement of the grievance. Finally EA notified Sperry of its intention to submit the dispute to arbitration, and, upon the latter's failure to comply with the demand, initiated the within proceeding. The District Court found that each step of the grievance procedure provided for in the contract had been completed. Sperry alleged that there had been an agreement between the parties to modify the prescribed grievance procedure so that Sperry might file a supplemental answer to EA's claim. On this issue the findings of the District Court rejecting Sperry's allegation are fully supported by the record.

The principal issue on this appeal is whether the dispute between the parties that caused EA to file its grievance is an arbitrable dispute under the language of the collective

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Employer and the Association, shall be taken up between the Association Grievance Committee and the Vice Presidents for Operations and for Industrial Relations, or their duly designated representative or representatives. Subsequent handling of such disputes, differences, and grievances shall be in accordance with the provisions of paragraphs (b) and (c) of Part A above."

The pertinent portion of paragraph (b) states that "The Employer shall notify the Association in writing within two weeks after this meeting of its decision" and paragraph (c) provides that "In the event that the Association does not accept the Employer's answer, it shall, within two weeks after the receipt thereof, notify the Employer of its intention to submit the same for arbitration."

bargaining agreement. Merely because the dispute was "grievable," it does not necessarily follow that it was also arbitrable. The grievance procedure established by the contract covers a wider range of controversies than the arbitration clause. The former extends to "all disputes, differences or grievances that may arise between the Association and the Employer • • • " The latter clause is more limited. It provides for the submission to arbitration of "all disputes, differences, or grievances arising out of the interpretation or application of the provisions of this agreement • • • " Hence Sperry contends that since, under the contract, the granting of merit increases is a matter within its sole discretion, the union's grievance does not give rise to an arbitrable dispute. EA replies, and we think correctly, that this contention begs the question. EA contends that even if *merit* increases are at the sole discretion of the employer, the issue here is whether the salary increases were in fact granted for merit, or whether in fact they were granted as an incentive for employees to transfer to the Utah plant. If the increases were granted on the latter basis they were increases that were prohibited by the collective bargaining agreement. A determination of their true nature is properly arbitrable under the contract.

EA argues that although merit increases are at the sole discretion of the employer, the present dispute concerns the interpretation of the phrase "on a merit basis only" as that phrase applies to the particular increases objected to. Hence, it concludes, the dispute "arises out of the interpretation or application" of the agreement, and is, therefore, arbitrable. In reply, Sperry asserts that under the contract it retains the right to grant merit increases, and

that such increases are not reviewable by an arbitrator. It urges that the union should not be permitted to obtain a review of such increases merely by the device of attaching a foreign label to them, *i.e.*, by calling them "transfer increases," for if EA were permitted to create an arbitrable dispute merely by asserting that salary increases have been granted on the basis of considerations other than merit, the purpose underlying the "sole discretion" clause would be largely nullified. Sperry argues that it has bargained not merely for the right to grant merit increases, but also for the right to do so without being called before an arbitrator whenever EA disagrees with the increases granted. Consequently, Sperry contends, the court should not compel arbitration unless EA produces evidence which tends to justify its assertion that the salary increases were not granted for merit, and were granted for other reasons. Since, in Sperry's view, the union has failed to produce such evidence, the grievance does not give rise to an arbitrable dispute.

Proceedings under Section 301 are governed by federal law, *Textile Workers Union* v. *Lincoln Mills, supra.* The section does not contain any guides for decision, and therefore, limited only by the policy of our national labor laws, we must fashion the applicable rules from other sources. "State law, if compatible with the purposes of Section 301 may be resorted to in order to find the rule that will best effectuate the federal policy." *Lincoln Mills, supra,* at 457. Also, we may look to the Federal Arbitration Act which, though not binding upon us in suits brought under Section 301, *General Electric Co.* v. *Local 205,* 353 U. S. 547 (1957),

does provide a "guiding analogy." *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. C. Mass. 1953).

Under New York law, the law which would govern this dispute were it not for the power granted the federal courts by Section 301, arbitration will not be compelled unless the party demanding it introduces evidence of the existence of an arbitrable dispute. *General Electric Co.* v. *United Electrical Radio and Machine Workers*, 300 N. Y. 252, 90 N. E. 2d 181 (1949); *Application of Berger*, 78 N. Y. S. 2d 528 (Sup. Ct. 1948). The difficulty in the present case, as the court below recognized, is that a determination of the arbitrability of the grievance depends upon the same facts relevant to a decision by an arbitrator upon the merits of the grievance. If the wage increases granted by Sperry were "on a merit basis only," then Sperry has not only not violated the contract, but the present dispute is not arbitrable. If, on the other hand, the increases were granted on the basis of considerations other than merit, Sperry has violated the contract and the dispute is arbitrable. But, merely because there is an identity of issues in the two proceedings, the court is not relieved of its duty to determine whether an arbitrable dispute exists. In construing the provisions of the Federal Arbitration Act, we have stated that after determining that the parties have entered into an arbitration agreement, the duty of the court is to determine "whether any of the issues raised in the suit were within the reach of that agreement." *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (2 Cir. 1942). This duty cannot be adequately performed unless the court examines the facts upon which the demand for arbitration is based as those facts relate to the language of the agreement.

See *Industrial Tinder Union* v. *Woonsocket Dyeing Co.*, 122 F. Supp. 872 (D. C. R. I. 1954). To make out a case for arbitration, Sperry's alleged breach must be "put in issue by facts, as distinguished from unsupported charges * * *" *Application of Berger, supra*, at 532; *General Electric Co.* v. *United Electrical Radio and Machine Workers, supra.*

It should be observed, however, that even in a case such as the present one, where the same facts are determinative of both arbitrability and the merits of the controversy, an order compelling the parties to submit to arbitration does not impinge upon the power of the arbitrator to decide the merits of the dispute. The difference between the two proceedings is in the quantum of proof necessary for the moving party to obtain relief. In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the contract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim. Once the tendency of the evidence to support the claim has been established, it is then the function of the arbitrator to weigh all the evidence and to then determine whether the contract was broken.

An examination of the record indicates that EA has introduced evidence which tends to support its claim that the parties are engaged in a dispute that is arbitrable under the contract. Sixteen of the twenty-eight employees consenting to transfer to the Utah plant received salary increases. Eight of these sixteen were promoted to a higher classification. Sperry asserts, and EA does not deny, that salary increases accompanying promotion to a higher clas-

sification have always been treated as merit increases. But, the other eight employees who received salary increases were not promoted; they were merely given positions of higher responsibility. EA contends that salary increases granted under these circumstances are not granted on "a merit basis only." This contention gives rise to a substantial problem in the interpretation of the agreement. EA is entitled to have an arbitrator determine whether it is correct in its contention or whether the sole discretion retained by Sperry in connection with the granting of merit increases permits the latter to grant increases to employees assuming positions of higher responsibility.

The record also reveals that each of the sixteen employees who received salary increases immediately received those increases, even though their promotions or their assumptions of higher responsibility were not effective until they transferred to Utah, transfers which apparently have not occurred yet. Without passing upon the weight to be given this evidence, we think that EA may legitimately argue that the timing of the increases gives rise to a likely inference that the purpose of the increases was to provide an incentive to transfer and not to compensate for meritorious performance of duty.

We conclude that EA has established the existence of an arbitrable dispute. Whether it is correct in contending that the salary increases were granted for considerations other than merit is a question which the parties have agreed to submit to an arbitrator, and the court below properly ordered such a submission.

Affirmed.

Opinion of District Court

EDELSTEIN, *D.J.*:

The petitioner, a labor union, seeks to compel the respondent employer to arbitrate a controversy under the terms of an arbitration clause contained in the collective bargaining agreement between the parties. The employer operates a plant in New York and, upon opening a plant in Utah, offered some of the New York employees transfers to Utah. It appears that some of the employees consenting to the transfer were given increases. The collective bargaining agreement, after setting forth salary rates, provides that they may be increased "on a merit basis only", and further recites that merit increases are at the sole discretion of the employer. The employer maintains that the increases involved were merit increases, but the union contends that they were transfer bonuses, not subject to the unilateral action of the employer. The contract provides for the arbitration of "all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement * * *."

The jurisdiction of this court is invoked under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, and Sections 4 and 6 of the United States Arbitration Act, 9 U.S.C. §1 *et seq.* The respondent, conceding division of authority among Courts of Appeal, takes the position that the court lacks jurisdiction. However, in this Circuit, at least, it is established that Section 301, which authorizes the bringing of suit in a district court for the violation of a contract between an employer

and a labor organization, without regard to the amount in controversy or the citizenship of the parties, created "a generally applicable and uniform federal substantive right" as well as "a remedy and a forum in which to enforce it." *Shirley-Herman Co.* v. *International Hod Carriers*, (2 Cir.) 182 F. 2d 806, 809; *Signal-Stat Corporation* v. *Local 475, etc.*, (2 Cir.) 235 F. 2d 298. A number of district courts, including the Southern District of New York, have held that Section 301 itself authorizes decrees of specific performance of arbitration agreements. *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137; *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163; *Local 207, Elec. etc.* v. *Landers, Frary & Clark*, 119 F. Supp. 877; *Evening Star Newspaper Co.* v. *Columbia Typographical Union*, 124 F. Supp. 322; *Insurance Agents' International Union* v. *Prudential Ins. Co.*, 122 F. Supp. 869. But see *Local 205, etc.* v. *General Electric Company*, (1 Cir.) 233 F. 2d 85, 96. In any event, inasmuch as federal law is applicable under Section 301, for remedy as well as substance, the United States Arbitration Act may provide the remedy of specific performance.

But "the remedy of an original action for specific performance under §4 is available only as to an arbitration agreement contained in the types of contracts defined by §2 as qualified by §1." *Local 205, etc.* v. *General Electric Company, supra*, 233 F. 2d at page 97. Section 2 defines as valid and enforceable "a contract evidencing a transaction involving commerce" to settle a dispute by arbitration. And Section 1 excludes application of the act to "contracts of employment of seamen, railroad em-

ployees, or any other class of workers engaged in foreign or interstate commerce." The collective bargaining agreement in this case is a "contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Act. *Signal-Stat Corporation* v. *Local 475, etc.* (2 Cir.) 235 F. 2d 298; *Local 205, etc.* v. *General Electric Company,* (1 Cir.) 233 F. 2d 85; and see *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 108, 200-201. And the Court of Appeals for the Second Circuit has indicated, in *Signal-Stat Corporation* v. *Local 475, supra,* its agreement with the Third Circuit's decision and reasoning in *Tenny Engineering, Inc.* v. *United Electric, Radio & Machine Workers,* 207 F. 2d 450, that "even assuming a collective bargaining agreement is a 'contract of employment'—the exclusionary clause in Section 1 applies only to 'workers engaged in • • • interstate commerce', *i.e.*, only those actually in the transportation industries." 235 F. 2d at page 302. The workers involved in this case are not in a transportation industry. Accordingly, the United States Arbitration Act is properly applicable.

Nor is jurisdiction to compel arbitration withdrawn by the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* The case of *Alcoa S.S. Co.* v. *McMahon,* (2 Cir.) 173 F. 2d 567, cert. den. 338 U. S. 821, is inapposite. There it was held that the Norris-LaGuardia Act precluded the issuance of an order compelling a union to carry out the contract of employment, in compliance with the declaratory judgment interpreting the collective labor agreement. The situation in that case giving rise to a demand for an injunction is precisely the type of situation at which the Norris-LaGuardia Act was aimed; an order upon the union

would have been classic labor injunction, "typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute." *Local 205, etc.* v. *General Electric Company, supra,* 233 F. 2d at page 91. "The general structure, detailed provisions, declared purposes, and legislative history of that statute show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made." *Textile Workers Union* v. *American Thread Co., supra,* 113 F. Supp. at page 142. On the contrary, a policy of the Norris-LaGuardia Act to foster arbitration of disputes between employers and unions is effectuated by a decree of specific performance of a voluntary arbitration agreement. *Wilson Brothers* v. *Textile Workers Union, supra,* 132 F. Supp. at pages 165-166.

Under Section 4 of the Arbitration Act, the court in an action to compel arbitration considers no issues (except for equity considerations) other than (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement. There is no dispute over the making of the agreement to arbitrate. But the employer denies his liability to arbitrate under that agreement because (1) the demand for arbitration is premature and (2) there is no arbitrable issue.

Under the collective labor agreement, a grievance may not come to arbitration until the specified grievance procedure has been carried out. That procedure entails (for an "Association-Employer Grievance" as here involved)

a grievance session between the union's grievance committee and the employer's representatives in operations and industrial relations. After that session, the employer has two weeks in which to notify the union of its decision in writing. In the event that the union does not accept that answer it must, if it desires to arbitrate, notify the employer within two weeks of its intention to submit the issue for arbitration. The union filed a written grievance with the company and the parties met to take up the grievance. But it is alleged that, because only a small number of persons were involved and the situation appeared to be a non-recurring one, the grievance committee and the employer's representatives agreed to settle the issue without going into the substance or merits of the grievance. An "Answer to Grievance No. 42-56" was served on the union, embodying the settlement, but the settlement by the grievance committee was subject to further approval by the union. The union ultimately declined to ratify the settlement, and made a demand for arbitration.

This procedure would seem to be in conformity with the prescribed procedure preliminary to arbitration. However, the employer maintains that there had been an agreement that, should the settlement be rejected, the company had the right to file a new answer directed to the merits, which would be processed through the grievance procedure. The parties did meet on the grievance subsequently, at which time the union agreed to furnish the names of the persons involved and agreed to state in writing the relief it sought. The list of names was submitted, and

separately, marked "Addendum II to Grievance #42-56", a statement was furnished setting forth the relief sought. There were subsequently a letter from the company to the union seeking clarification of the relief sought and a union reply to that letter. On October 1, 1956 the company filed another "Answer to Grievance No. 42-56". But the petition in this case was verified four days before that answer was filed with the union and was received at the company corporate offices on the same day that the company's answer was filed at the plant. Consequently, it is argued, at the time this proceeding commenced, the grievance procedure had not yet been completed. Moreover, the employer argues that its right was not merely the formal one of filing an answer, but of having it considered in good faith by the union, which it could not have done, in the circumstances.

The employer's position is essentially that the first "Answer to Grievance No. 42-56" was in fact no answer, by agreement between the parties permitting the employer to substitute a new answer on the merits in the event of union rejection of the settlement. But such an agreement is denied under oath. The fact that the parties did meet subsequently and discuss the merits does not establish that there was an agreement to waive or extend the contract procedure. It is set forth, without contradiction, that at subsequent meetings the employer's representatives addressed themselves to the arbitration demand already served and declared their unwillingness to arbitrate, without reference to a new answer or a new arbitration demand. Moreover, in the letter responding to the company's request for clarification of the relief demanded,

the union asked that the company proceed without delay in the selection of an arbitrator. Such a request is inconsistent with the existence of the agreement alleged. In any event, I cannot, on the facts presented in the affidavits, make a finding that there was such an agreement. It is, of course, the ideal function of the grievance procedure in a collective labor agreement to explore the merits of grievances with a view to amicable disposition on the basis of mutually understood facts. But it is hardly alien to the funtion of a grievance procedure to settle disputes in some other way, as was attempted here. The fact that the substance of the grievance was not aired is no doubt unfortunate, but the grievance machinery of the contract is one of procedure; if the procedure is exhausted, the company may not be heard to complain that the procedure did not embrace the merits of the complaint. Otherwise, a step would be added to the grievance procedure not specified in the contract. Except for the time limitations which, it is alleged without contradiction, were extended by both sides, the contract procedure was followed and the demand for arbitration was not premature.

The employer's position on the arbitrability of the dispute is that on the basis of prior negotiations and litigation between the parties, it is established that they contracted in view of New York law that only bona fide disputes would be arbitrable. *General Electric Co.* v. *United Electrical Radio & Machine Workers of America, C.I.O.*, 300 N. Y. 262; *Taft* v. *Sperry Gyroscope Co.*, 127 N. Y. S. 2d 61. The dispute, it is alleged, actually involves the union's desire to arbitrate a grievance that merit increases had been improperly withheld from certain employees. But

inasmuch as that claim is not arbitrable, or even properly the subject of a grievance, under the clause in the contract giving to the company sole discretion in the matter of merit increases, the union instead filed a grievance about the granting of such increases to others (who were leaving the bargaining unit anyway), thereby (1) using the grievance for "propaganda" purposes pursuant to a long standing attempt to alter the sole discretion clause, and (2) hoping to apply pressure on the company in favor of those who had not received merit increases. Accordingly, the company has set forth facts in connection with the granting of the increases to the employees in question, and argues that it is the burden of the union to meet the challenge by persuading the court that there is a bona fide basis for the claim; if the court concludes that the agreement has not been violated there can be no arbitration.

In the General Electric case, supra, 200 N. Y. at page 264, the New York law is stated: "If, under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration. • • • Whether or not a bona fide dispute exists is a question of law • • •." In that case, under the guise of a claim that the company was violating the anti-discrimination provision of the collective bargaining agreement by failure to afford pension credits for time spent in union activities beyond those hours for which the company had agreed to pay, the union sought arbitration. But the court found that the company was not obliged under the contract to give pension credits for time spent in union activity beyond a maximum number of hours per week.

for which the company had agreed to pay, and there was no arbitrable issue, even though the alleged dispute fell within the literal language of the arbitration agreement. And in *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d 61, involving the parties at bar in the instant case, the court found that although the issue for arbitration was ostensibly that the company granted merit increases for reasons other than merit, the real issue, on the basis of the relief demanded, was the arbitration of wage schedules, clearly beyond the arbitral machinery.

These cases are authority for nothing more than the proposition that arbitration may not be compelled on an issue not arbitrable under the contract, and arbitrability may not be conferred by the mere device of a label. The contract between the parties provides that the employer may, at its sole discretion, grant increases "on a merit basis only". The union contests certain increases as not being on a merit basis only, but as being, at least in part, transfer bonuses. The employer insists, with supporting allegations of fact, that the increases were on a merit basis only and not subject to arbitration by being labeled with another name. But the determination of whether the label attached by the union is inaccurate involves, in this case, a determination of disputed fact, in anticipation of the arbitration itself, and a begging of the entire question. The determination of arbitrability, that is, whether there has been a violation of contract by the company, or a default of arbitration, must be one of law. It must be found that the issue raised is in reality outside the scope of the contract, as appears from a consideration

of the true nature of the claim against the terms of the agreement. In prior litigation between the parties, it has been noted that "in appropriate circumstances an arbitrable dispute may exist upon a claim that increases are granted or withheld upon grounds and causes other than merit in violation of the spirit and purpose of the agreement." *Taft* v. *Sperry Gyroscope Co., supra,* 127 N. Y. S. 2d at page 62. It would appear that the appropriate circumstances exist at this time. The issue sought to be arbitrated is whether the increases given were on a merit basis only and this issue is certainly, in the terms of the contract, a dispute "arising out of the interpretation or application of the provisions" of the agreement. There is a direct challenge that certain increases were not merit increases and the decision of the arbitrator will be that they were or were not, with no implication of extraneous or collateral issues involving the general wage schedule, or the granting or withholding of increases or the amount of any increase. There is no basis as a matter of law for a determination that an extraneous issue is being subjected to arbitration by the application of a label. The union motive for seeking arbitration, if the issue is arbitrable, may not be tried in the judicial forum, no matter how significant it may be in the arena of labor-management relations.

Moreover, it would seem that the employer itself considered the issue to be arbitrable, inasmuch as it participated, apparently without objection, in the processing of the dispute through the grievance machinery. Cf. *Signal-Stat Corporation* v. *Local 475, etc.,* (2 Cir.) 235 F. 2d 298. In-

deed, in arguing the prematurity of the arbitration demand submitted before the merits of the grievance were explored, the employer insists that the grievance procedure was designed precisely to bring out the kind of facts available in this instance to avoid misunderstanding based upon preconceptions and lack of information. If the dispute is one referable to the grievance machinery, it is not one within the sole discretion of the employer. While not all "grievable" disputes are arbitrable under the contract, this one is, for it involves a difference arising out of the interpretation or application of the provision in the contract authorizing the employer to make increases on a merit basis only.

Accordingly, the application to compel arbitration will be granted.

Dated: February 5th, 1957.

DAVID N. EDELSTEIN
United States District Judge

Judgment entered Feb. 5, 1957.
HERBERT A. CHARLSON
Clerk

APPENDIX B

Opinion of New York Supreme Court, 131 N. Y. L. J. 6, Matter of Taft (Sperry Gyroscope Co.)

SCHREIBER, *J.*:

Motion to stay arbitration is granted. Petitioner seeks to arbitrate the question of whether the company has violated the provisions of the agreement by granting general wage increases in the guise of merit increases. Only a bona fide dispute is arbitrable (*Matter of General Electric Co.*, 300 N. Y. 262; *Albert* v. *Admiration Knitwear Co.*, 304 N. Y. 1). There is nothing in the contract which limits wage increases to employees. As to employees in the Class II classification, the contract provides for a minimum and maximum rate, while as to Class I there is only provision for a minimum rate. There is no claim that the company has violated the minimum and maximum provisions of the agreement. Again, apart from a general contention, petitioner has not indicated even one case where it claims the increase granted was not based upon merit. The charge that there was a "general" increase is wholly unsupported by any proof whatever. The company, on the other hand, has demonstrated that there was no "general" increase and that the merit review procedure was followed in granting increases. Moreover, the agreement provides that "merit increases are at the sole discretion of the Employer". That discretion is not reviewable (*Application of Western Electric Co., Inc.*, 277 App. Div., 858, aff'd 301 N. Y. 727). Consequently, I find no bona fide dispute here which is arbitrable under the agreement. Settle order.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 831

SPERRY GYROSCOPE COMPANY,
Division of Sperry Rand Corporation,

Petitioner,

—v.—

ENGINEERS ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1957

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ENGINEERS ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

I

The EA asserts in its brief that the dispute was processed through the grievance procedure without being resolved (p. 2) and that Sperry asserts that the parties agreed to process it a second time (p. 2). It further asserts that Sperry refused arbitrarily to arbitrate and did not refuse because of the failure to reprocess the grievance (p. 3). It concludes that the issue of fact as to whether the parties did agree to process the grievance after the rejection of the settlement (which called for EA's withdrawal of the grievance) is immaterial because "it would be a futile gesture for EA to process the dispute through the grievance procedure a second time" (p. 5).

Throughout its brief, the EA implies that one processing of the grievance took place. That is patently contrary to the fact. The parties met, but before any processing of the grievance took place, it was agreed that the EA would withdraw the grievance (subject to ratification which did not fully occur). At this point the substance of the grievance was not discussed (R. 16-17). Thus, when the EA asked for arbitration, there had been no processing of the grievance and, as it turned out, the EA did not even know what the facts were. Even when the EA filed its petition in the District Court it did not know what the facts were. (Cf. R. 4-5 with R. 49-52 and opinion at Petition pp. 26-27.)

After the EA demanded arbitration, the parties *for the first time* held a grievance session to review the substance of the grievance (R. 17). Following that grievance session, the EA, for the first time, indicated the increases to which it objected and the relief it sought (R. 17-18). However, it filed its petition in the District Court before receiving the Company's statement on the grievance (R. 18).

The Court of Appeals acknowledged that the collective agreement "requires as a condition precedent to arbitration that the grievance procedure elsewhere provided for in the contract be exhausted prior to a demand for arbitration" (Pet p. 21). Therefore, the EA cannot argue that it is unimportant whether it exhausted the grievance procedure before it petitioned the District Court, merely because the Company rejected demands for arbitration made before the grievance procedure was exhausted and before the EA knew the facts involved in the grievance. It is, after all, the first purpose of the grievance procedure

that the parties learn each other's position on the facts and on the principles involved—and this the EA did not do.

It cannot be said that it was useless to process the grievance through the procedure and neither court below so stated. The District Court acknowledged that the purpose of the grievance procedure had been frustrated but declared that it could not "make a finding that there was such an agreement" to review the substance of the grievance in the grievance procedure (Pet. p. 34). We have shown that there was a conflict in the affidavits as to this matter which could not be resolved on a motion for summary judgment. It is certainly not immaterial that a procedure made, by the contract, a condition precedent to arbitration, never took place.

II

The EA claims that the proceeding below was "based upon *both* Section 301, LMRA of 1947 and Sections 4 and 6 of the United States Arbitration Act", that Sperry did not challenge the summary nature of the proceedings in the District Court, and challenged the lack of process and the summary procedure for the first time on appeal (p. 5). It further asserts that the District Court took jurisdiction under Section 301 and utilized the Arbitration Act to provide the remedy (p. 5).

It must be recognized at the outset that the Arbitration Act does not require a summons and that it authorizes a summary procedure. However, Section 301 does require a summons and it does call for the normal plenary procedure.

The EA's notice of motion stated:

> "Please Take Notice that, pursuant to Sections 4 and 6 of the United States Arbitration Act, U.S.C. Title 9, and upon the annexed petition . . . the undersigned will make an application . . ." (R. 2)

Thus, the EA put Sperry on notice that its application was made under the Arbitration Act and therefore that no process was required and that summary procedure was permissible.

Although no mention of Section 301 appears in the notice of motion, in which the EA purported to set forth the statute under which the application was made, the EA says that jurisdiction may nevertheless be founded *solely* upon Section 301 because it referred to that section in the petition. However, in its brief in the District Court, the EA explained its reference to Section 301 by the following statement:

> "Section 4 of the United States Arbitration Act provides for the affirmative enforcement of agreements to arbitrate future disputes by authorizing the party aggrieved to *petition any federal court which, in the absence of the agreement to arbitrate, would have jurisdiction of the underlying controversy* for an order directing that arbitration proceed in the manner provided by such agreement." (R. 108) (emphasis supplied)

Thus, the EA itself took the position that the reference to Section 301 was to establish that the District Court "in the absence of the agreement to arbitrate, would have jurisdiction of the underlying controversy." That was why Section 301 was not mentioned in the notice of motion. The application was not being made under Section

301; that section merely satisfied the requirement of Section 4 of the Arbitration Act. It is a far cry from that to assert that jurisdiction was founded solely upon Section 301!

In our brief to the District Court we similarly stated:

> "Under Section 4 of the Federal Arbitration Act, a petition to compel arbitration may be filed only with a court which, save for the agreement to arbitrate, 'would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties.' Petitioner predicates the jurisdiction of this Court *for the purpose of complying with the quoted requirement* upon Section 301(a) of the Taft-Hartley Act . . .
>
> There is no action here under Section 301(a) of Taft-Hartley so that if the Federal Arbitration Act does not apply here, the petition must be denied whatever the result under Section 301(a)." (R. 109-110) (emphasis supplied)

Thus, in the District Court, both the EA and Sperry understood that there was no application under Section 301 but only under the Arbitration Act. And we plainly stated, in view of that fact, that if jurisdiction did not exist under the Arbitration Act, the application must be denied. In that posture of the case, Sperry could not object to absence of a summons or to the summary procedure.

The District Court held that:

> "the United States Arbitration Act is properly applicable" (R. 85)

Again, therefore, while we urged that this conclusion was wrong, we could not complain of lack of process or of the summary procedure.

However, when the Court of Appeals rested jurisdiction solely upon Section 301, an entirely new posture was assumed by the case since service of a summons and the usual plenary procedures are required in actions begun under Section 301. Objections on these grounds became available, therefore, only after the decision of the Court of Appeals.

III

It is claimed by the EA that its grievance arose from increases "given now to employees who agreed to accept transfers to a different plant at a future time when such plant would become available for operations" and that it demanded arbitration "of whether the increases in question were or were not 'on a merit basis only' " (p. 2).

This claim is a transparent effort to change the grievance and the demand for arbitration to justify the decision of the Court of Appeals which held arbitrable matters not included either in the grievance or the demand for arbitration.

In the grievance, the EA objected to increases that:

> "are based entirely upon the employee's consent to being transferred to California" (R. 40)

and the grievance ended:

> "The Association charges that, by unilaterally granting salary increases based entirely upon a Class I employee's consent to be transferred to California . . ., the Company is violating Article 18, Paragraphs H and J, as well as Article 1 of the current agreement between the parties." (R. 41)

In its demand for arbitration, the EA again objected to increases that "are based entirely upon the employee's consent to being transferred to California" (R. 11). The EA demanded arbitration of the following issue:

> "Is the Sperry Gyroscope Company, Division of Sperry Rand Corporation, violating Article 18, Paragraphs H and J, of the current Agreement between the Company and the Engineers' Association by unilaterally granting salary increases to Class I employees in Department 5282 on the basis of such employees consenting to being transferred to a customer installation in Pasadena, California . . ." (R. 12)

Thus, the EA did not grieve or demand arbitration concerning whether the increases were "on a merit basis only", as it states in its brief (p. 2), nor whether increases could be given now for future transfers but solely whether, as the grievance charges (R 41) the increases had been granted

> "based entirely upon a Class I employeee's consent to be transferred to California."

The Court of Appeals acknowledges that of 28 transferring employees, 12 received no increases (Pet. p. 26). It also found that 8 had properly received promotional increases (Pet. pp. 26-27). Finally, it found:

> "But the other eight employees who received salary increases were not promoted; they were merely given positions of higher responsibility." (Pet. p. 27)

Since these increases were given for "positions of higher responsibility", they could not have been "based entirely

upon a Class I employee's consent to be transferred to California." That alone disposes of the grievance. Moreover, as we have pointed out, the policy statement controlling merit increases expressly authorized

> "Merit increases . . . to reflect a corresponding change in duties or responsibilities." (R. 80)

There could therefore be no possible question left as to the propriety of these last 8 increases.

IV

The EA states (p. 6) that Sperry is complaining of a failure to give greater weight to "certain specific New York lower court decisions." It fails to state that Sperry referred to one specific decision in a proceeding between the EA and Sperry which construed the very same arbitration clause and merit increase clause as are here involved.

The opinion is set forth in Appendix B to the Petition. In it, the Court held:

> "Moreover, the agreement provides that 'merit increases are at the sole discretion of the Employer.' That discretion is not reviewable."

Following that holding, the parties twice renewed these clauses without change in the face of EA attempts to have them altered in order to reverse the effect of the decision quoted above (R. 25-35). In the light of this history, that opinion is more than just "a New York lower court decision", as the EA characterizes it.

The EA concludes that the decision of the Court of Appeals is consistent with national policy which calls for

furthering "arbitration of labor controversies pursuant to agreement of the parties." We have no quarrel with that proposition. We think it clear, however, that *the agreement of the parties* did not call for arbitration in this case.

Respectfully submitted,

EMANUEL L. GORDON
Counsel for Petitioner

March 31, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

SPERRY GYROSCOPE COMPANY, DIVISION OF SPERRY RAND CORPORATION,

Petitioner,

v.

ENGINEERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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SPERRY GYROSCOPE COMPANY, DIVISION OF SPERRY RAND CORPORATION,

Petitioner,

v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

Petitioner Sperry and Respondent EA entered into a collective bargaining agreement which provides for the arbitration of unresolved "disputes, differences or grievances arising out of the interpretation and application of the provisions of this Agreement" (R. 4).

The following dispute arose:

The Agreement establishes minimum wage rates and provides that Sperry may grant salary increases above

such minimum rates "on a merit basis *only*" (R. 5; Art. 18, Par. H, p. 30 of Ex.)[1]

Sperry gave salary increases to a number of employees who accepted transfers to a company plant in another geographical area (R. 4-5, 15-16; Ex. C, R. 10-12). Employees who were offered such a transfer but who refused to accept it, received no increase (R. 5).

Sperry labelled the increases "merit" (R. 5, 49-53).

EA claimed the increases were not "merit", but were given *now* to employees who agreed to accept transfers to a different plant at a future time when such plant would become available for operations (R. 61, 4-5; Ex. C, R. 10-12). EA filed a grievance (Ex. 1, R. 39-41).

If the increases were truly "on a merit basis only", the Agreement permits Sperry to grant them unilaterally (Art. 18, Pars. E and H, pp. 29, 30 of Ex.).

However, if the increases were on the basis of considerations other than "merit only", Sperry may not grant them unilaterally (Ex. C, R. 10-12).

The dispute was processed through the grievance procedure without being resolved (R. 6-7; Ex. C, R. 12; R. 54-57).

EA demanded arbitration of whether the increases in question were or were not "on a merit basis only" (R. 5; Ex. C, R. 10-12).

Sperry unequivocally refused to arbitrate this dispute, saying it would go to court before arbitrating (R. 57, 66).

Petitioner asserts that the parties had agreed to process the dispute through the grievance procedure a second time if EA rejected Sperry's proposed settlement (R. 17). EA

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[1] "Ex" refers to the collective bargaining agreement which was certified as a separate exhibit by the Clerk of the Court of Appeals.

refutes this assertion and points to the undenied fact that Sperry refused to arbitrate categorically and not because the grievance procedure should have been utilized a second time for the same dispute (R. 54-57).

EA commenced a proceeding to compel arbitration in the District Court for the Southern District of New York by filing and serving a verified petition (R. 3-8) and notice of motion (R. 2). The petition based the Court's jurisdiction on "Section 301 of the Labor Management Relations Act, 1947, U. S. C. Title 29, Section 185 and the United States Arbitration Act, U. S. C. Title 9" (R. 3). The notice of motion recited that it was brought "pursuant to Sections 4 and 6 of the United States Arbitration Act, U. S. C. Title 9 and upon the annexed petition" (R. 2).

Sperry, therefore, had full notice that the proceeding to compel arbitration was based upon *both* Section 301, LMRA of 1947 and Sections 4 and 6 of the United States Arbitration Act.

Sperry appeared and submitted an answering affidavit and exhibits on the merits (R. 14-53).

Sperry did not raise any question as to service of a summons or as to the summary nature of the proceeding in the District Court. The District Court rendered judgment compelling Sperry to arbitrate (p. 28, Petitioner's brief).

Sperry appealed and, for the first time, raised the questions of (a) not having been served with summons and (b) the summary nature of the proceeding in which the judgment compelling arbitration was rendered.

The Court of Appeals affirmed the judgment (p. 19, Petitioner's brief).

The crux of Sperry's petition to this Court is that, under *Textile Workers Union of America* v. *Lincoln Mills*, 353

U. S. 448, 77 S. Ct. 912, the jurisdiction of a federal court to compel arbitration pursuant to the terms of a collective bargaining agreement is based upon Section 301, LMRA, 1947; therefore, only a plenary suit commenced by summons, rather than a summary proceeding commenced by notice of motion, could be the basis for a judgment compelling arbitration.

Certiorari Should Be Denied.

1. EA's petition (R. 3) and notice of motion (R. 2) expressly announced to Sperry that the proceeding to compel arbitration was based on Section 301 of the Labor Management Relations Act as well as upon the United States Arbitration Act. Sperry elected to resist the proceeding on the merits by answering affidavit and exhibits (R. 14-49) as well as rebuttal affidavit and exhibit (R. 68-82). It did not elect to raise the question that summons and plenary suit alone could be the sole conduit to the relief sought by EA. Sperry cannot escape the judgment compelling arbitration by asserting this defense for the first time on appeal. Rule 12(b) and (h), Federal Rules of Civil Procedure; *Carter* v. *Powell*, 104 F. 2d 428, 430 (C. A. 5, 1939), rehearing denied 104 F. 2d 1012, cert. denied 308 U. S. 611, 60 S. Ct. 173; *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871, 874 (C. A. 3, 1944), cert. denied 322 U. S. 740, 64 S. Ct. 1057; see 3 Cyclopedia of Federal Procedure (3rd Ed.) 325, Section 11.05.

It is clear, therefore, that this case is not the suitable vehicle to test whether arbitration may be compelled, under Section 301 of the Labor Management Relations Act, by plenary suit rather than by summary proceeding.

Sperry argues, further, that the proceeding cannot be treated as a motion for summary judgment because there exists an issue of fact as to whether or not the parties agreed to process their dispute through the grievance procedure a second time (Petitioner's brief, p. 15).

However, Sperry does not deny that, after EA demanded arbitration, Sperry on two occasions categorically refused to arbitrate the grievance, stating it would go to court before it would arbitrate (R. 57, 66). In the light of this unrefuted refusal to arbitrate, it would be a futile gesture for EA to process the dispute through the grievance procedure a second time. The asserted issue of fact urged by Sperry as a barrier to summary judgment thus becomes drained of any legal probative force and fails to achieve the status of a "genuine issue as to any material fact." Rule 56, Federal Rules of Civil Procedure. It may not, therefore, preclude summary judgment. *Durasteel Co.* v. *Great Lakes Steel Co.*, 205 F. 2d 438, 441 (C. A. 8, 1953).

2. The district court assumed jurisdiction under Section 301 of the Labor Management Relations Act and utilized the United States Arbitration Act to provide the remedy of compelling Sperry to arbitrate (Opinion of District Court, p. 29 of Petitioner's brief). The Court of Appeals affirmed, relying solely upon Section 301 as the source of jurisdiction (Opinion of Court of Appeals, p. 20 of Petitioner's brief).

The courts followed different paths to reach the same result. But this no longer raises an important and unsettled question for this court. *General Electric Company* v. *Local 205, United Electrical, Radio and Machine Workers of America*, 353 U. S. 547, 77 S. Ct. 921 (1957).

3. Sperry interprets the issue found to be arbitrable by the Court of Appeals as being different from the issue which EA sought to arbitrate (Petitioner's brief, pp. 16-17). It is clear that the issue found to be arbitrable is whether particular increases were "on a merit basis only" and, as such, squares with the issue which EA sought to arbitrate (Ex. C, R. 10-12).

This issue raises neither a federal question of substance nor an important question of federal law.

4. The Court of Appeals looked to compatible New York law and to the Federal Arbitration Act as "a guiding analogy"[2] in order to find the rule that would best effectuate the federal policy, when affirming the judgment compelling Sperry to arbitrate. In so doing, the Court of Appeals was guided by this Court's decision in *Lincoln Mills, supra.* Sperry insists greater weight should have been accorded certain specific New York lower court decisions urged by Sperry as dispositive of the issue herein. This raises no substantial question as to the proper weight to be given State law generally in enforcing collective bargaining agreements under Section 301 of the Labor Management Relations Act. The approach of the Court of Appeals is consonant with the "policy of our national labor laws" to further, rather than frustrate, the arbitration of labor controversies pursuant to agreement of the parties. *Textile Workers* v. *Lincoln Mills, supra; Textile Workers Union* v. *American Thread Co., supra*; *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163 (S. D. N. Y. 1954), app. dismissed 224 F. 2d 176 (C. A. 2, 1955), cert. denied 350 U. S. 834; Section 201, Labor Management Relations Act, 1947.

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[2] *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. C. Mass. 1953).

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: March 27, 1958.

Respectfully submitted,

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